(30)

No. 00-730-CFX Title: Adarand Constructors, Inc., Petitioner
v.
Norman Y. Mineta, Secretary of Transportation, et al.

Docketed:
November 7, 2000 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Nov 3 2000	Petition for writ of certiorari filed. (Response due January 19, 2001)
	Nov 3 2000	Appendix of petitioner filed.
	Nov 30 2000	Order extending time to file response to petition until January 8, 2001.
	Dec 6 2000	Brief amicus curiae of L. S. Lee, Inc. filed.
	Dec 6 2000	Brief amicus curiae of Southeastern Legal Foundation filed.
	Jan 5 2001	Order further extending time to file response to petition until January 19, 2001.
	Jan 19 2001	Brief amicus curiae of Associated General Contractors of America, Inc. filed.
	Jan 19 2001	Brief of respondents Rodney Slater, Secretary of Transportation, et al. in opposition filed.
	Jan 29 2001	Reply brief of petitioner Adarand Constructors, Inc. filed.
	Jan 31 2001	DISTRIBUTED for Conference of February 16, 2001
	Feb 20 2001	REDISTRIBUTED for Conference of February 23, 2001
	Feb 20 2001	Record requested.
	Mar 3 2001	REDISTRIBUTED for Conference of March 16, 2001
	Mar 7 2001	Record filed.
	Mar 15 2001	Record filed.
	Mar 19 2001	REDISTRIBUTED for Conference of March 23, 2001
	Mar 26 2001	Petition GRANTED. SET FOR ARGUMENT October 31, 2001. **********
	Apr 11 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 11, 2001.
	Apr 13 2001	The order granting the petition for a writ of certiorari is amended to read as follows: The petition for a writ of certiorari is granted limited to the following questions: 1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination. 2. Wheteher the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.
	May 22 2001	Application (00A1028) to file a to file a brief on the merits in excess of the page limitations in excess of page limits, submitted to Justice Breyer.
	May 23 2001	Application (00A1028) denied by Justice Breyer.
	Jun 1 2001	Brief amici curiae of Joshua Aronson, Social Science and Comparative Law Scholars filed.
	Jun 6 2001	Brief amici curiae of Pacific Legal Foundation, et al.

3 pp

No. 00-730-CFX

Entry	Date	Proceedings and Orders
		filed.
	Jun 8 2001	Brief amicus curiae of L.S. Lee, Inc. filed.
	Jun 8 2001	Brief amicus curiae of Southeastern Legal Foundation, Inc. filed.
	Jun 11 2001	Brief amicus curiae of Associated General Contractors of America, Inc. filed.
	Jun 11 2001	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed.
	Jun 11 2001	Brief amicus curiae of Center for Individual Rights filed.
	Jun 11 2001	LODGING consisting of twenty spiral bound copies of related material submitted by counsel for amici, Center forIndividual Rights.
	Jun 11 2001	Brief of petitioner Adarand Constructors, Inc. filed.
	Jun 11 2001	Brief amici curiae of GEOD Corporation and Atlantic Legal Foundation filed.
	Jun 18 2001	Motion of petitioner to dispense with printing the joint appendix filed.
	Jun 29 2001	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Jul 3 2001	Order extending time to file respondent's brief on the merits to and including August 10, 2001.
	Aug 10 2001	Brief amici curiae of Women First National Legislative Committee, et al. filed.
	Aug 10 2001	Brief amici curiae of Max Baucus, et al. filed.
	Aug 10 2001	Brief amicus curiae of City and County of Denver filed.
	Aug 10 2001	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Aug 10 2001	Brief amici curiae of Office of Communication of the United Church, et al. filed.
	Aug 10 2001	LODGING consisting of twenty copies of related documents submitted by counsel for amici Women First Natl. Legislative Comm., et al.
	Aug 10 2001	Brief amici curiae of National Asian Pacific American Legal Consortium, et al. filed.
	Aug 10 2001	LODGING consisting of twenty sets of ten exhibits submitted by counsel for amici Natl. Asian Pacific American Legal Consortium, et al.
	Aug 10 2001	Brief of respondents Norman Y. Mineta, Secretary of Transportation, et al. filed.
	Aug 10 2001	Appendix of respondent filed.
	Aug 10 2001	Brief amici curiae of National League of Cities, et al. filed.
	Aug 10 2001	Brief amici curiae of Minority Business Enterprise Legal Defense, et al. filed.
	Aug 10 2001	Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.
	Aug 10 2001	Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed.
	Aug 16 2001	CIRCULATED.
	Aug 21 2001	LODGING consisting of twenty sets of a three-volume compendium of studies and reports submiotted by the

No. 00-730-CFX

Entry	Date	Proceedings and Orders
		Solicitor General and distributed.
	Sep 5 2001	Application (01A215) of petitioner to file a reply brief on the merits in excess of the page limitation, submitted to Justice Breyer.
	Sep 7 2001	Application (01A215) denied by Justice Breyer.
	Sep 10 2001	Reply brief of petitioner Adarand Constructors, Inc. filed.
	Oct 17 2001	LODGING consisting of twenty copies of a letter from the Solicitor and distributed.
	Oct 31 2001	ARGUED.
	Nov 2 2001	Letter from counsel for the petitioner received and distributed.
	Nov 27 2001	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

Supreme Court, U.S.
FILED
00.730 NOV -3 2000
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

RODNEY SLATER, Secretary of the United States Department of Transportation, KENNETH WYKLE, Administrator of the Federal Highway Administration, VINCENT F. SCHIMMOLLER, Administrator of Region VIII, Federal Highway Administration, and LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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24 5pp

ISSUE PRESENTED

Whether strict scrutiny may be applied differently to Congress than to other governmental actors?

LIST OF PARTIES

Adarand Constructors, Inc. ("Adarand"), in *Adarand Constructors, Inc. v. Peña*, was Plaintiff before the United States District Court for the District of Colorado, Appellant before the United States Court of Appeals for the Tenth Circuit, Petitioner before the United States Supreme Court, Plaintiff before the United States District Court for the District of Colorado (on remand), and, in *Adarand Constructors, Inc. v. Slater*, Appellee before the United States Court of Appeals for the Tenth Circuit, Petitioner before the United States Supreme Court, and Appellant before the United States Court of Appeals for the Tenth Circuit (on remand). Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The caption of the Petition contains the name of all the parties. Respondents named therein are joined in their official capacities and they, or their predecessors, in *Adarand Constructors, Inc. v. Peña*, were Defendants before the United States District Court for the District of Colorado, Appellees before the United States Court of Appeals for the Tenth Circuit, Respondents before the United States Supreme Court, Defendants before the United States District Court for the District of Colorado (on remand), and, in *Adarand Constructors, Inc. v. Slater*, Appellants before the United States Court of Appeals for the Tenth Circuit, Respondents before the United States Supreme Court, and Appellees before the United States Court of Appeals for the Tenth Circuit (on remand).

TABLE OF CONTENTS

Page

ISSUE PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. THE PANEL SET AN INTOLERABLE PRECEDENT BY APPLYING A FAR MORE LENIENT STANDARD OF "STRICT SCRUTINY" TO ACTS OF CONGRESS THAN APPLIES TO THE ACTIONS OF STATE AND LOCAL GOVERNMENTS 5

A. The Panel Vitiated The Strict Scrutiny Requirement That A Statutory Racial Classification Is Not Narrowly Tailored If It Does Not Allow Individualized Inquiry, If Race-Neutral Solutions Were Possible, Or If Its Duration Is Unlimited 7

TABLE OF CONTENTS – Continued

Page

1. Since The Challenged Statutory Scheme Prohibits Agencies From Requiring Proof That The Particular DBE Seeking A Racial Preference Has Suffered From Discrimination, The Entire Scheme Is Unconstitutional On Its Face For Want Of Individualized Inquiry 8

2. Since The Barriers To Participation In Commerce By DBEs That The Panel Identified Are Easily Susceptible To Race-Neutral Solutions, The Challenged Statutory Racial Classifications Cannot Be Narrowly Tailored 10

3. Since The Barriers The Panel Identified Have Always Been, And Always Will Be, Common To All Market Entrants, The Challenged Statutory Racial Classifications Cannot Be Narrowly Tailored For Want Of Limited Duration 13

4. But For The Forbidden Excuses Of Administrative Convenience Or Racial Politics, The Panel Could Not Have Deemed The Challenged Statutory Scheme Narrowly Tailored 14

B. The Panel Vitiated The Strict Scrutiny Requirement That A Plaintiff Has No Burden Of Proof Until After The Government Produces Strong Evidence That A Statutory Racial Classification Was Supported At The Time Of Its Enactment By A Compelling State Interest In Remedying Particularized Discrimination In Which The Government Somehow Participated 15

TABLE OF CONTENTS – Continued

Page

1. The Panel Accepted As "Strong," Evidence Of Racial Disparities That It Did Not And Could Not Attribute To Deliberate Discrimination 17

2. The Panel Accepted As "Strong," Evidence It Could Not Properly Have Concluded Was Even Probative Without Further Analysis 19

3. The Panel Accepted As "Strong," Evidence That Did Not Exist At The Time Of The Statutes' Enactment And That Therefore The Panel Should Not Have Considered At All 21

4. Congress' Only Apparent Goal In Incorporating The Challenged Racial Presumptions Into TEA-21 Was "Racial Proportionality," Which Cannot Serve As A Compelling Interest Regardless Of The Evidence 23

5. By Improperly Deeming The Submitted Evidence "Strong," The Panel Misapplied The Burdens Of Proof And Production 24

C. By Allowing A Putative New Regulatory Regime To Rescue The Compulsory Statutory Racial Presumptions From Constitutional Infirmity, The Panel Ignored That The Regulations Are Inapposite, Insufficient, Or Void 25

1. The New Regulations Regarding Race-Neutral Alternatives Are Completely Inapposite Because They Apply To State Entities, Not To US-DOT, And To Grants, Not To Direct Procurement 26

TABLE OF CONTENTS – Continued

Page

2. The New Regulations Regarding Presumptions Are Insufficient To Save The Statutes Because The Regulations Do Not Even Purport To Alter The Presumption Of Social Disadvantage, Leaving The Statute Unconstitutionally Over-Inclusive On Its Face 27

3. If The New Regulations Did Apply, They Would Be Void 28

II. THIS CASE, NOW PENDING FOR OVER A DECADE, INVOLVES A MATTER OF EXCEPTIONAL NATIONAL IMPORTANCE THAT DEMANDS A FINAL DECISION ON THE MERITS BY THIS COURT SO THAT NUMEROUS SIMILAR CASES NOW PENDING THROUGHOUT THE FEDERAL COURT SYSTEM MAY BE DECIDED PROPERLY AND CONSISTENTLY 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Adarand v. Peña, 515 U.S. 200 (1995) ..... *passim*

Adarand v. Slater, 120 S.Ct. 722 (2000) (*per curiam*) 3, 4, 29

Bush v. Vera, 517 U.S. 952 (1996) 22

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Frontiero v. Richardson, 411 U.S. 677 (1973) 15

Fullilove v. Klutznick, 448 U.S. 448 (1980) 8, 15

Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 9

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 13

Shaw v. Hunt, 517 U.S. 899 (1996) 21, 22

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 29

United States v. Larinoff, 431 U.S. 864 (1977) 28

United States v. Virginia, 518 U.S. 515 (1996) 25

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 13

CIRCUIT COURT CASES

Adarand v. Slater, 169 F.3d 1292 (10th Cir. 1999) 4

Associated Gen'l Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730 (6th Cir. 2000) 7, 16, 20, 22

TABLE OF AUTHORITIES – Continued

Page

Concrete Works of Colo. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) 19

Contractors Associations of Eastern Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997) 7, 10, 16, 21, 29

Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) 11, 18

Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) 10, 23

Lutheran Church-Missouri Synod v. Federal Communications Comm'n, 141 F.3d 344 (D.C. Cir. 1998) 24

McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998), *cert. denied*, 525 U.S. 981 (1998)..... 24

Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997)..... 7

Tuttle v. Arlington City School Bd., 195 F.3d 698 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 1552 (2000)..... 24

Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 969 (2000) 12

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998)..... 24

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998) 12

District Court Cases

Adarand v. Peña, 965 F.Supp. 1556 (D. Colo. 1997)...*passim*

Association for Fairness in Business, Inc. v. New Jersey, 82 F.Supp.2d 353 (D.N.J 2000) 12

TABLE OF AUTHORITIES – Continued

Page

Dynalantic Corp. v. U.S. Dept. of Defense, 937 F.Supp. 1 (D.D.C. 1996) (No. 95-2301), *rev'd*, 115 F.3d 1012 (D.C. Cir. 1997)..... 30

McCrossan Construction, Inc. v. Rahn, 96 F.Supp.2d 1238 (D.N.M. 2000) 30

Rothe Development Corp. v. U.S. Dept. of Defense, 49 F.Supp.2d 937 (W.D.Tex. 1999) 30

Statutes And Regulations

Intermodal Surface Transportation Efficiency Act ("ISTEA"), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919 (1991)..... *passim*

Small Business Act, Section 8(d), Pub. L. No. 95-507 (1978), 15 U.S.C. § 637(d)(1-6) ..... *passim*

15 U.S.C. § 644(g) 2, 4

Transportation Equity Act for the Twenty First Century ("TEA-21"), Pub. L. No. 105-178, § 1101(b) (1998) ..... *passim*

13 C.F.R. § 124.1002(a) (2000) 27

13 C.F.R. § 124.104(b)(1) (2000)..... 28

48 C.F.R. § 19.001 (2000)..... 27

48 C.F.R. § 19.703 (2000)..... 27

48 C.F.R. § 52.219-8..... 27

49 C.F.R. Part 23, Subpart D, Appendix C..... 14

49 C.F.R. § 26.21..... 2

49 C.F.R. § 26.3(d) (2000) 27

49 C.F.R. § 26.51..... 26

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R. part 26 .....26, 27

49 C.F.R. §§ 26.65(b), 26.67(b)(1) (2000) 28

62 F.R. 29548 (May 30, 1997) 27

The Compelling Interest for Affirmative Action in Federal Procurement, 61 F.R. 26050 (1996) 22, 23

LEGISLATIVE HISTORY

144 Cong. Rec. S1395 (March 5, 1998) 12, 24

144 Cong. Rec. S1481 (March 6, 1998) 12, 24

144 Cong. Rec. H2000 (April 1, 1998) 12, 24

OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, *Adarand Constructors, Inc. v. Slater, et al.*, 2000 WL 13[illegible]571 (10th Cir.) (Docket No. 97-1304), reversing grant of summary judgment for Adarand granted by the U.S. District Court for the District of Colorado. That Tenth Circuit opinion appears at pages App. 1-97 of the Appendix. The District Court opinion, *Adarand Constructors, Inc. v. Pena, et al.*, 965 F.Supp. 1556 (D.Colo. 1997), appears at App. 128-201.

JURISDICTION

Title 28 U.S.C. § 1254(1) grants this Court jurisdiction to review the Tenth Circuit opinion entered on September 25, 2000.

CONSTITUTIONAL PROVISION INVOLVED

This Petition for *Writ of Certiorari* involves the Fifth Amendment to the United States Constitution. App. 293.

STATUTES INVOLVED

The statutes involved in this Petition include Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act ("STURRA"), 101 Stat. 145-146; Section 1003(b) of the Intermodal Surface Transportation Efficiency Act ("ISTEA"), 105 Stat. 1919; Section 1101(b) of the Transportation Equity Act for the Twenty First Century ("TEA-21"), Pub. L. No. 105-178; and Sections 8(d), 637(d), and 644(g) of the Small Business Act, 15 U.S.C. §§ 637(d), 644(g). App. 294-316.

STATEMENT OF THE CASE

This case began over a decade ago when Adarand Constructors, Inc. ("Adarand") brought suit against the Secretary, and other officials, of the United States Department of Transportation ("US-DOT") challenging federal

statutes that established a federal program under which federal highway construction contracts are awarded on the basis of race. Having already twice reversed decisions by panels of the Tenth Circuit in this case, this Court is familiar with the rudiments of that program and the undisputed facts.

For present purposes it is sufficient to note the following, which this Court set forth in *Adarand v. Pena*, 515 U.S. 200, 204-211 (1995) (*"1995 Adarand"*). The federal statutes compel US-DOT to presume that all members of some races are "socially and economically disadvantaged" and that all members of other races are not. 15 U.S.C. § 637(d)(1-3). The statutes provide that businesses owned by "socially and economically disadvantaged" individuals shall be certified, either by US-DOT or a state, as disadvantaged business enterprises ("DBEs"). 15 U.S.C. § 637(d)(1); *See* 49 C.F.R. § 26.21. The federal statutes also establish a specific, numeric, goal for DBE participation in all federal procurement, *e.g.*, 15 U.S.C. § 644(g), and, through a combination of compulsion and incentives, the statutes enlist private contractors to assist US-DOT in achieving that goal. As to compulsion, the statutes require every private prime contractor, on penalty of being ineligible to win federal contracts, to establish and adhere to a plan to try to hire DBEs as subcontractors. 15 U.S.C. § 637(d)(4-6). As to incentives, the statutes authorize US-DOT to provide money bonuses to contractors who hire DBEs. 15 U.S.C. § 637(d)(4)(E). Finally, the statutes require US-DOT and prime contractors to insert certain clauses, which detail these requirements, into federal highway construction contracts. 15 U.S.C. § 637(d)(1-6).

In this particular case, the central undisputed fact is that, despite being the lowest bidder, Adarand failed to win a subcontract as a result of a government-paid cash bonus that caused the prime contractor, Mountain Gravel & Construction Company ("Mountain Gravel"), to hire one of Adarand's four DBE-certified competitors. Specifically, Congress required Mountain Gravel to try to hire

DBE contractors and US-DOT paid Mountain Gravel an irresistible ten thousand dollar bonus for doing so. US-DOT paid the bonus through a contract mechanism called the Subcontracting Compensation Clause ("SCC").[1] As a result of this stick and carrot arrangement, Adarand lost the West Dolores guardrail subcontract to a competitor, Gonzales Construction Company ("Gonzales"). Adarand is not a DBE. Gonzales is. But for the existence of both the stick (Mountain Gravel's compulsory DBE subcontracting plan) and the carrot (the $10,000 bonus US-DOT paid Mountain Gravel to hire Gonzales), Adarand would have won the subcontract. These facts are not disputed. *Adarand v. Slater*, 120 S.Ct. 722, 724 (2000) (*per curiam*) (*"2000 Adarand"*); *1995 Adarand*, 515 U.S. at 205; *Adarand v. Peña*, 965 F.Supp. 1556, 1559 (D. Colo. 1997) (*"1997 Adarand"*).

There is no dispute, therefore, that Congress and US-DOT treated Gonzales differently than they treated Adarand and did so solely on the basis of the race of their owners. Thus, the issue in this case is whether this mandatory, race-based difference in treatment by the federal government survives the strict scrutiny analysis required by the Equal Protection component of the Fifth Amendment to the United States Constitution.

In 1992, the U.S. District Court for the District of Colorado granted summary judgment to US-DOT and the Tenth Circuit affirmed two years later. In 1995, this Court reversed and remanded, ordering the lower courts to apply "strict scrutiny" to the federal statutes and regulations at issue, rather than the intermediate scrutiny the lower courts had applied. *1995 Adarand*, 515 U.S. at 238-239. On remand in 1997, the District Court held that all the statutes – the ones that set the goals, as well as the

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[1] Contrary to the confusion engendered by the Tenth Circuit panel, the SCC is not the federal program at issue in this case; it is only a small part of the entire federal race-based highway construction contracting program; that is, one mechanism by which that program is implemented.

ones that compel attempts at and create incentives for their achievement – were unconstitutional as applied in this case. *1997 Adarand*, 965 F.Supp. at 1584.

When US-DOT's appeal in this case reached the Tenth Circuit, a panel of that Court held that *Adarand* was moot. *Adarand v. Slater*, 169 F.3d 1292 (1999) (*"1999 Adarand"*). This Court reversed and remanded, ordering the Tenth Circuit to resolve the matter on the merits. *2000 Adarand*, 120 S.Ct. at 726-727.

On September 25, 2000, eleven years almost to the day on which Adarand lost its bid for the West Dolores project subcontract, the Tenth Circuit issued its opinion. A panel of the Tenth Circuit held that the District Court had erred in granting summary judgment to Adarand and reversed. Though the panel declined to consider all elements of this integrated statutory scheme,[2] the panel ruled that 15 U.S.C. § 637(d)(1-3), and the manner in which the panel decided those statutes are now being implemented, all survived "strict scrutiny." First, the panel deemed § 637(d)(1-3) facially constitutional.[3] Second, the panel held that the SCC was unconstitutional as applied at the time of the West Dolores subcontract and for years thereafter. App. at 79. Third, however, the panel held that US-DOT had rectified the one constitutional deficiency of the federal race-based highway construction contracting program – the SCC – by voluntarily abandoning that particular mechanism and by concomitantly instituting a new set of regulations. App. at 58-60. Thus, with the single exception of the voluntarily abandoned

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[2] The panel denied Adarand standing to challenge §§ 8(a), 644(g), and 8(d)(4-6). App. at 14.

[3] The panel stated it would "address the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality." App. at 14 (Italics in original, underline added). In addition, since the panel only denied Adarand standing to challenge §§ 8(a), 644(g), and 8(d)(4-6), the implication is clear that the panel held that Adarand has standing to challenge § 8(d)(1-3).

SCC, the panel's holding left the federal race-based highway construction contracting program completely intact.

Adarand now petitions this Court for *certiorari* to review the decision of the Tenth Circuit entered on September 25, 2000.

REASONS FOR GRANTING THE WRIT

I. THE PANEL SET AN INTOLERABLE PRECEDENT BY APPLYING A FAR MORE LENIENT STANDARD OF "STRICT SCRUTINY" TO ACTS OF CONGRESS THAN APPLIES TO THE ACTIONS OF STATE AND LOCAL GOVERNMENTS.

In its 1995 ruling in this case, this Court held that where fundamental constitutional rights are concerned, equal protection analysis requires application of the same standard in all cases, regardless of the unit of government involved. In unmistakable terms, this Court concluded:

> [A]ny person, of whatever race, has the right to demand that *any governmental actor* subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the *strictest* judicial scrutiny.
>
> * * *
>
> Accordingly, we hold today that all racial classifications, imposed *by whatever federal, state, or local governmental actor*, must be analyzed by a reviewing court under strict scrutiny.

515 U.S. at 224, 227 (emphasis added). Properly applied, strict scrutiny requires that any racial classification, by Congress, by a State, or by a local government, must be narrowly tailored to achieve a compelling state interest. 515 U.S. at 235. Having "alter[ed] the playing field" by mandating a far more stringent standard of review than the panel applied in 1994, this Court remanded this case to the lower courts for the application of the self-same "strict scrutiny" test that applies to "any governmental actor." 515 U.S. at 237.

Notwithstanding this Court's clear and repeated elucidation of the "strict scrutiny" test, the panel applied a form of "strict scrutiny" that bears no resemblance whatsoever to the "strict scrutiny" test this Court has applied and ordered the panel to apply. First, the panel discerned a series of "barriers" to minority participation in commerce and it held that eliminating those barriers provided a compelling governmental interest sufficient to support the challenged statutory racial classifications. Those barriers were:

- The tendency of company owners to pass ownership of their companies to members of their families instead of members of minority groups, App. at 34-35;
- The difficulty people with no experience have in joining a union in order to gain the experience needed to compete with established non-minority companies, App. at 35;
- The difficulty of obtaining access to capital in the absence of a credit history or collateral, App. at 35;
- The tendency of prime contractors to work with subcontractors they already trust because they have worked with those subcontractors before, App. at 39-40;
- "Bid shopping," a practice by which prime contractors allow trusted former subcontractors to see and beat any lower bid from new, untested firms trying to replace those former subcontractors, App. at 40;
- The inability of new enterprises to obtain bonding because they lack experience, which in turn hampers their ability to gain experience, App. at 41-43; and
- The inability of new market entrants to receive special pricing arrangements from suppliers from whom they have never purchased anything before, App. at 43-44.

Under proper strict scrutiny analysis, these barriers could not possibly justify a statutory racial classification. Thus, although professing to apply "strict scrutiny," the panel failed to demand a strong basis in evidence to support a compelling governmental interest in redressing a deliberate pattern or practice of racial discrimination in which

the federal government had somehow participated. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Second, the panel failed to apply the narrow tailoring prong to the race-based statute. Specifically, the panel failed to demand that the challenged statutory racial classification be a last resort justified only by the absence of race-neutral alternatives; that it include individualized inquiry into each person seeking to benefit by it; and that it have limited duration.

Not only does the panel's decision create an intolerable conflict with *1995 Adarand*, it also creates an intolerable conflict with decisions of other Circuit Courts of Appeals. *See, e.g, Associated Gen'l Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997); *Contractors Associations of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 607 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997). This Court must grant the petition to resolve these conflicts.

A. The Panel Vitiated The Strict Scrutiny Requirement That A Statutory Racial Classification Is Not Narrowly Tailored If It Does Not Allow Individualized Inquiry, If Race-Neutral Solutions Were Possible, Or If Its Duration Is Unlimited.

At a bare minimum, to be narrowly tailored a statute that contains a racial classification must meet three criteria. First, this Court established conclusively in *Croson* that narrow tailoring commands Congress to "inquir[e] into whether or not the *particular* [D]BE seeking a racial preference has suffered from the effects of past discrimination" at the hands of the federal government. *Croson*, 488 U.S. at 508 (emphasis added). Quoting this very passage from *Croson*, both courts below recognized that this prohibition against over-inclusiveness is inescapable. App. at 71-72; 965 F.Supp at 1580.

Second, Congress may enact a racial classification only after "consideration of race-neutral means to

increase minority business participation in government contracting." 515 U.S. at 237-238. This Court so held in its 1995 decision in this case. *Id.*

Third, as this Court also stated in this very case, Congress must ensure that the program has a finite duration tailored to the problem at hand. As this Court put it, Congress must ensure that the program "[i]s appropriately limited such that 'it will not last longer than the discriminatory effects it is designed to eliminate.' " 515 U.S. at 237-238 (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

Simply stated, the program must be race-neutral if at all possible; it cannot be over-inclusive; and it cannot go on forever. Notwithstanding these clear directives, the panel eschewed race-neutral solutions that readily present themselves and embraced the race-based classification set forth in the challenged statutes. In so doing, the panel failed to apply all three of these narrow tailoring criteria properly. Instead, the panel allowed administrative difficulty to excuse constitutional infirmity. But administrative convenience is not a constitutionally permissible excuse for a failure to tailor narrowly. As this Court held in *Croson*, "[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." 488 U.S. at 508.

1. Since The Challenged Statutory Scheme Prohibits Agencies From Requiring Proof That The Particular DBE Seeking A Racial Preference Has Suffered From Discrimination, The Entire Scheme Is Unconstitutional On Its Face For Want Of Individualized Inquiry.

This Court made clear that a statutory racial classification must provide individualized inquiry into whether each person seeking to take advantage of a race-based preference has suffered the effects of discrimination at the hands of the government in question. *Croson*, 488 U.S. at 508. A program that fails to do so, this Court held, is not narrowly tailored by definition. In fact, this Court deemed it "obvious" that, unless minority entrepreneurs are asked whether each had experienced discrimination in which the government had somehow participated, "[A] [race preference] program is not narrowly tailored to remedy the effects of prior discrimination." *Id.*

Moreover, whereas a statute that fails to require the necessary individualized inquiry may be unconstitutional "as applied," a statute that prohibits such inquiry is unconstitutional "on its face." A statute is unconstitutional on its face when it "[i]s apparent that . . . the statute could never be applied in a valid manner." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984).

Here, the challenged statutes do not just fail to require the constitutional prerequisite of individual inquiry. Instead, they affirmatively prohibit individualized inquiry because the presumption that all members of certain races are disadvantaged is mandatory. 15 U.S.C. §§ 637(d)(1-3). *See also infra*, n.2. Thus, the District Court correctly observed that the challenged statutory scheme:

> [R]equires the following contractual language: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . . "

965 F.Supp. at 1562. It also correctly observed that:

> Under both the 8(a) and the 8(d) programs, the race-engendered presumptions of disadvantage may be rebutted if a third party comes forward with evidence that the participant in question is not, in fact, socially or economically disadvantaged. See 13 C.F.R. §§ 124.111(c)-(d) and 124.601-609 (1996). . . . [O]nly third parties may

> come forward to initiate a rebuttal of presumptive disadvantage . . . [;] no such duty falls upon the Defendants or any other governmental entity.

965 F.Supp. at 1565.

Not surprisingly, given the clarity of this Court's holding in *Croson*, other Circuit Courts of Appeals have reached the same conclusion: no statute is narrowly tailored that awards relief, not on the basis of disadvantage suffered as a result of one's race, but on the basis of membership in a racial group. *See Hopwood v. Texas*, 78 F.3d 932, 951 (5th Cir. 1996) ("A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny"); *Philadelphia*, 91 F.3d at 607 ("preference for [D]BEs was shared by an amalgam of minorities, including Hispanics, American Indians, Aleuts, Eskimos, Asians and Native Hawaiians . . . [but] there was no evidence that any of these groups suffered from discrimination [and therefore] . . . the 15% preference for minorities was not a narrowly tailored remedy for past discrimination").

Since the challenged statutes preclude, or at least fail to require, the necessary inquiry, they cannot possibly be "narrowly tailored" unless the strict scrutiny test applies differently to Congress. This Court held that it does not. Because the panel's decision with regard to narrow tailoring creates an intolerable conflict with the holdings of this Court and other Circuit Courts of Appeals, this Court must grant the petition to resolve the conflict.

2. Since The Barriers To Participation In Commerce By DBEs That The Panel Identified Are Easily Susceptible To Race-Neutral Solutions, The Challenged Statutory Racial Classifications Cannot Be Narrowly Tailored.

The panel deemed the statutes at issue in this case sufficiently narrowly tailored to remedy a series of seven

barriers to minority participation in commerce, detailed in Section I above. Distilled to their essence, they describe the difficulties faced by any new entrant into an established industry, regardless of the entrant's race. Therefore, these factors are precisely the same factors that this Court considered in *Croson* and for which this Court rejected a race-conscious solution. They are nothing but:

> [A] host of non-racial factors which would seem to face a member of any racial group attempting to establish a new business enterprise such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record.

488 U.S. at 498-499. "Under such circumstances," this Court concluded, the solution to such problems must also be race-neutral:

> Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If [D]BEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation.

488 U.S. at 507. In other words, because race classifications are permissible only in an "extreme case," 488 U.S. at 509, and only when "every constitutional 'i' is dotted and every 't' is crossed," *Engineering Contractors of So. Fla., Inc. v. Metropolitan Dade County*, 943 F.Supp. 1546, 1556 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998):

> [T]he strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort.

Croson, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment). In fact, a "race conscious remedy will not be narrowly tailored until less sweeping alternatives – particularly race-neutral ones – have been considered *and tried*." *Walker v. City of Mesquite*, 169 F.3d 973, 985 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 969 (2000) (emphasis added); *accord Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997) *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998); *accord, Association for Fairness in Business, Inc. v. New Jersey*, 82 F.Supp.2d 353, 362 (D.N.J. 2000) (finding lack of narrow tailoring in part because there was no evidence New Jersey first actually attempted race-neutral means).

The race-conscious statutory scheme in this case was not a last resort, because surely, as this Court noted in *Croson*, the government:

> [H]as at its disposal a whole array of race-neutral devices to increase the accessibility of [government] contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.

488 U.S. at 510.[4]

Since a race-neutral solution is available in the present case, only a race-neutral solution can pass muster under proper application of the narrow tailoring prong of strict scrutiny analysis. Consequently, the panel's holding that the statutory presumption of racial disadvantage is

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[4] Presented the opportunity, Congress specifically rejected such race-neutral assistance for all disadvantaged entrepreneurs, opting instead to continue a race-based program to achieve racial diversity and proportionality. *See* 144 Cong. Rec. S1395-S1434 (March 5, 1998); 144 Cong. Rec. S1481-S1496 (March 6, 1998); 144 Cong. Rec. H2000-H2011 (April 1, 1998).

narrowly tailored is unsupportable unless the narrow tailoring requirement means something different when applied to Congress. *Certiorari* is necessary to ensure that the same strict scrutiny test applies in the same way to all governmental actors. *1995 Adarand*, 515 U.S. at 237.

3. Since The Barriers The Panel Identified Have Always Been, And Always Will Be, Common To All Market Entrants, The Challenged Statutory Racial Classifications Cannot Be Narrowly Tailored For Want Of Limited Duration.

To survive the narrow tailoring prong of strict scrutiny analysis, a statutory racial classification must have at least some limit on duration. More particularly, its duration must not exceed the discriminatory effects it is designed to remedy. 515 U.S. at 237-238. The purpose of this durational limitation is best reflected in Justice Powell's artful phrasing in *Wygant v. Jackson Board of Education*:

> [A]s the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive[; and i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

476 U.S. 267, 276 (1986) (emphasis in original): *See, e.g., Croson*, 488 U.S. at 498 (quoting this passage); *Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978) ("remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past").

To justify the challenged statutes, however, the panel invoked seven "barriers" to minority participation in commerce that have always been and will always be present for any new entrant to an established industry. Moreover, § 8(d), which sets forth the presumption that

all members of certain races are disadvantaged, has no sunset provision whatsoever. It has been a permanent fixture of federal law since its passage in 1978, over twenty two years ago. Pub. L. No. 95-507. As a result, if the barriers the panel relied on were capable of justifying the statutory scheme, the duration limitation requirement would be vitiated because these barriers have been present agelessly into the past and will be present timelessly into the future. Consequently, given the panel's reliance on ageless and timeless "barriers," this statutory scheme could only have survived proper narrow tailoring analysis if the duration requirement for strict scrutiny is different for Congress than for a State. This Court must grant *certiorari* to ensure Congress is held to the same strict scrutiny test that applies to racial classifications by other governmental actors.

4. But For The Forbidden Excuses Of Administrative Convenience Or Racial Politics, The Panel Could Not Have Deemed The Challenged Statutory Scheme Narrowly Tailored.

It is apparent that it is legislatively possible to assess individual injury of the members of the presumptively disadvantaged races in the statutory scheme in question. There is no dispute, in fact, that the Secretary has already laid out a method of assessing an individual's actual disadvantaged status on a case by case basis. Specifically, the regulations call for inquiry into whether an individual's injuries: (i) "stem from his or her color"; (ii) come from discrimination "he or she has personally suffered"; (iii) come from "treatment which he or she has experienced in American society"; (iv) "[are] chronic, long-standing, and substantial, not fleeting or insignificant"; and (v) "[have] negatively affected his or her entry into, and/or advancement in, the business world." 49 C.F.R. Part 23, Subpart D, Appendix C, "Social Disadvantage."

There are but two apparent reasons that Congress chose not to require – and, in fact, chose instead to prohibit – such individualized inquiry: administrative convenience and "racial politics." This Court has forbidden both.

Croson plainly precludes the excuse of administrative convenience. 488 U.S at 508. *See also, Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) (finding, "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Racial politics is equally taboo. As Justice Stevens noted in his dissent in *Fullilove*,

> [I]f th[e] history [of racism in America] can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme . . . , our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

448 U.S. at 539 (adopted by majority in *Croson*, 488 U.S. at 511).

Consequently, if the narrow tailoring test were the same for Congress as it is for the States, the challenged statutory scheme could not have passed constitutional muster. *Certiorari* is necessary to resolve this conflict in application of strict scrutiny.

B. The Panel Vitiated The Strict Scrutiny Requirement That A Plaintiff Has No Burden Of Proof Until After The Government Produces Strong Evidence That A Statutory Racial Classification Was Supported At The Time Of Its Enactment By A Compelling State Interest In Remedying Particularized Discrimination In Which The Government Somehow Participated.

This Court has made clear that the use of a racial classification by a governmental actor must be supported

by a strong basis in evidence of a compelling governmental interest in remedying particularized discrimination in which that government somehow participated. *Croson*, 488 U.S. at 492, 500; *Philadelphia*, 91 F.3d at 596 ("compelling state interest that can justify race-based preferences [exists] only when [the government] has acted to remedy identified present or past discrimination in which it engaged or was a 'passive participant' "). In fact:

> [T]he only cases found to present the necessary 'compelling interest' . . . are those that expose, as in the case of the Alabama Department of Public Safety in 1987, 'pervasive, systematic, and obstinate discriminatory conduct.' *Adarand*, 515 U.S. at 237. . . .

Drabik, 214 F.3d at 737.

Logically, of course, a "strong basis in evidence" requires more persuasive evidence than a mere "basis in evidence." Therefore, evidence does not qualify as strong unless that evidence is far more than just relevant or even probative.

Although the panel correctly recited that test, App. at 29-30, the panel badly misapplied each of the elements of that test. First, the panel accepted evidence that suggested, at worst, only society-wide disparities, not particularized findings of racial discrimination. The evidence did not suggest, let alone prove, racial discrimination and certainly not racial discrimination particularly applicable to the highway construction industry. Second, the panel deemed that evidence "strong," even though this Court and others would not even find it probative. Third, the panel's consideration of that dubious evidence was improper because that evidence was not before Congress when it passed the challenged statutes. Finally, having incorrectly decided that US-DOT had met its burden of production of "strong" evidence, the panel then incorrectly held that Adarand failed to rebut that "strong" evidence. Had the court properly applied the compelling

interest prong of the strict scrutiny test, Adarand would have had nothing to rebut.

1. The Panel Accepted As "Strong," Evidence Of Racial Disparities That It Did Not And Could Not Attribute To Deliberate Discrimination.

This Court held in *Croson* that "[i]n the extreme case some form of narrowly tailored racial preference might be necessary to break down patterns of *deliberate* exclusion." 488 U.S. at 509 (emphasis added). In this case, the panel considered only evidence of barriers common to all business start-ups, but nevertheless held that evidence qualified as a demonstration of an "extreme case" that justifies a "racial preference."

The only "evidence" that US-DOT produced, and upon which the panel relied, was its "Appendix I," an eleven-page document that merely recites the conclusory statements in favor of federal DBE legislation by sponsoring members of Congress and by supportive members of self-interested associations. App. at 367. The panel deemed this evidence "strong" and from it the panel discerned the series of seven "barriers" recited in Section I above (*see* App. 367). Those barriers were limited, in essence, to two observations: first, the construction industry is dominated by non-minority family firms that minorities find difficult to inherit; and, second, minority enterprises that wish to compete with these family firms find it difficult to do because, having neither experience nor collateral, they find it difficult to obtain bonding and capital and to develop strong, enduring relationships with vendors and customers.

Every one of the barriers the panel identified is a race-neutral set of circumstances that does not demonstrate racially motivated patterns of deliberate exclusion in the highway construction industry. In fact, the most that these circumstances demonstrate is the difficulty

faced by any new entrant into an established field of business. The District Court below, which functioned as the trier of fact in this case, agreed with this analysis, finding that the most notable deficiencies Congress was trying to remedy were:

> [D]eficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with the bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

965 F.Supp. at 1576. Again, with the exception of racist decisions by government functionaries, for which anti-discrimination statutes already provide a means of redress,[5] every one of these deficiencies is a race-neutral set of circumstances common to all business startups.

Therefore, if the panel's analysis goes uncorrected, even such ubiquitous circumstances as these could serve as an "extreme case" that justifies the "last resort" of compulsory racial discrimination. It is absolutely clear that the holding of the panel is in intolerable conflict with the holdings of this Court as to what evidence suffices for the imposition of racial remedies. This Court must grant the petition to resolve this conflict.

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[5] At the very least, "[t]he first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis." *Metro. Dade County*, 122 F.3d at 928-929. As this Court held in *Croson*, the government "could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." 488 U.S. at 509.

2. The Panel Accepted As "Strong," Evidence It Could Not Properly Have Concluded Was Even Probative Without Further Analysis.

This Court has held that "highly conclusionary statement[s] of a proponent of [DBE programs] that there was racial discrimination in the construction industry . . . are of little probative value in establishing identified discrimination. . . . " *Croson*, 488 U.S. at 500. In this case, the government's proffered evidence consistent of little else.

Instead, in order to conclude that there is strong evidence of a compelling interest, a court must find proper statistical evidence that the government participated, at least passively, in deliberate patterns of racial exclusion. *Croson*, 488 U.S. at 492, 500. As the panel below correctly recognized, anecdotal evidence may be considered only after it is determined that the necessary statistical evidence exists. App. at 29, *citing Concrete Works of Colo. v. City and County of Denver*, 36 F.3d 1513, 1520-21 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995). That statistical evidence, moreover, must be derived from the proper sample pool, which consists of those contractors who are not only qualified to perform the contracts in question, but also who are not otherwise engaged at the time. As this Court held in *Croson*,

> [C]omparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. . . . [W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

488 U.S. 501-502. This Court has noted that when a reviewing court fails to address whether the statistical evidence was derived from the proper sample, any finding of racial animus would rest on only "the completely unrealistic assumption that minorities will choose to

enter construction in lockstep proportion to their representation in the local population." *Id.* at 741. Accordingly, the Sixth Circuit held that:

> [D]eficiencies of the data are glaringly clear . . . [when] the data does not distinguish minority construction contractors from minority businesses generally, [or] makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.

Drabik, 214 F.3d at 736.

Nevertheless (assuming US-DOT's "Appendix I" somehow placed the necessary statistical evidence before the court, which it did not), the panel utterly failed to determine if those statistics took account of whether the contractors in the studies were "ready, willing and able" to do the work in question. Nowhere in its decision does the panel even address whether the alleged racial disparities it deemed "strong evidence" were derived from the proper statistical pool.

Likewise, the panel did not even inquire whether the government had played some active or passive role in causing any racial disparity that exists. App. at 31-49. For example, the panel asserted that:

> [S]ubcontractors' unions place before minority firms a plethora of barriers to membership, thereby effectively blocking [DBEs] from participation in a subcontracting market in which union membership is an important condition for success.

App. at 35. But then, without further analysis of this allegation or others like it, the panel simply concluded there was strong evidence of a compelling interest. Yet there was no analysis of whether the government somehow participated in the allegedly racially discriminatory practices of "subcontractors' unions."

Even if the panel had attempted to address the government participation issue, it could not have concluded properly that there was any evidence of governmental participation because discrimination must consist of more than simply paying the bills. In fact, under proper strict scrutiny analysis there is no evidence of government participation even when the government hired contractors that did business with third parties who engaged in racially discriminatory practices. *See Croson*, 488 U.S. at 502-03. The Third Circuit expressly denied, for example, that:

> [A]warding contracts pursuant to competitive bidding scheme and without reference to association membership could alone constitute passive discrimination by the [government] in membership discrimination by [those] contractor associations.

Philadelphia, 91 F.3d at 602. In this case, there is no evidence of even this third-party discrimination.

The panel therefore could not properly have concluded that the evidence before it was probative, let alone "strong," without further analysis. As a result, the panel's holding creates an intolerable conflict with the decisions of this and other courts as to what sort of evidence will suffice at the national level to justify statutory racial classifications. *Certiorari* is necessary as a result.

3. The Panel Accepted As "Strong," Evidence That Did Not Exist At The Time Of The Statutes' Enactment And That Therefore The Panel Should Not Have Considered At All.

This Court has made clear that "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). Instead, "the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification. . . . " *Id.* Furthermore, and crucially, "the institution that makes the racial distinction must have had a strong basis in

evidence to conclude that remedial action was necessary *before* it embarks on an affirmative-action program." 517 U.S. at 910 (emphasis in original, internal punctuation omitted); *accord Bush v. Vera*, 517 U.S. 952, 982 (1996) (the legislature " 'must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative action program,' " *quoting Shaw v. Hunt*, 517 U.S. at 910; *Croson*, 488 U.S. at 504 (requiring that government actors "must identify that discrimination . . . with some specificity *before* they may use race-conscious relief") (emphasis added). As the Sixth Circuit put it, "[T]he time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding." *Drabik*, 214 F.3d at 738.

In this case, however, none of the evidence the panel relied on was before Congress when it passed the racial presumptions in the challenged statutes. Congress enacted section 8(d) on October 24, 1978. Pub. L. No. 95-507. The panel, on the other hand, relied exclusively on statements and purported disparity studies and hearing reports and the like, none of which was dated any earlier than 1985, seven years too late. In fact, the panel relied most heavily on *The Compelling Interest*,[6] a *Federal Register* entry that was not published until 1996, five years after Congress passed ISTEA. Pub. L. 102-240 (December 18, 1991). Like STAA, STURAA, and ISTEA, moreover, TEA-21 is race-neutral on its face and only incorporates racial classifications by reference to § 8(d). Pub. L. No. 105-178, § 1101(b) (1998). Consequently, only evidence before Congress prior to 1978 is of value.[7]

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[6] *The Compelling Interest for Affirmative Action in Federal Procurement*, 61 F.R. 26050 (1996).

[7] There is no evidence that Congress, during adoption and re-enactment of the federal race-based highway construction contracting program in 1982, 1987, 1991, and 1998, ever revisited its 1978 determination in order to ascertain whether all the racial groups set forth therein had been the victims of racial discrimination in the highway construction industry, racial discrimination in which the government somehow participated.

Further, the panel admits that not even *The Compelling Interest* cites anything prior to 1980. App. at 31 (finding *The Compelling Interest* cites "approximately thirty congressional hearings since 1980"). 1980 is two years too late to be of relevance in this case. Therefore, not only did the panel improperly weigh the strength of the evidence before it, it should not have considered that evidence at all.

4. Congress' Only Apparent Goal In Incorporating The Challenged Racial Presumptions Into TEA-21 Was "Racial Proportionality," Which Cannot Serve As A Compelling Interest Regardless Of The Evidence.

As this Court held in *Croson*, racial proportionality cannot serve as a compelling interest, regardless of any evidentiary standard:

> The desire to reduce the historic deficit of traditionally disfavored minorities . . . and the need to counter the effects of societal discrimination . . . standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution.

488 U.S. at 496. Other courts have followed suit. *E.g. Hopwood v. Texas*, 78 F.3d at 944 ("any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest. . . . ").

Nevertheless, it is clear from the legislative history of the most recent highway funding statute to incorporate the racial classifications of § 8(d), TEA-21, that Congress

was not even attempting to provide a vehicle for remedying individualized harm. Its only goal was racial proportionality in the highway construction industry.[8] In fact, the record bears no indication at all of any permissible legislative intent. Consequently, *certiorari* is necessary because, if racial proportionality may serve as a compelling interest on the congressional level, then strict scrutiny applies differently to Congress, contrary to this Court's holding in this very case.

In addition, *certiorari* is necessary because, contrary to this Court's rulings in *1995 Adarand* and *Croson*, lower courts have adopted widely varying standards for the same strict scrutiny test. *See Tuttle v. Arlington City School Bd.*, 195 F.3d 698, 704 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 1552 (2000) ("The first question is whether diversity is a compelling governmental interest[; t]his question remains unresolved."); *Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344, 354 (D.C. Cir. 1998) (court "did not think diversity can be elevated to the 'compelling' level"); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998), *cert. denied*, 525 U.S. 981 (1998) (whether there may be compelling interests other than remedying past discrimination remains "unsettled"); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (assuming, without deciding, that diversity may be a compelling governmental interest).

5. By Improperly Deeming The Submitted Evidence "Strong," The Panel Misapplied The Burdens Of Proof And Production.

Properly applied, the burden of producing strong evidence is the "burden of justification," and, even in an

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[8] *See generally* 144 Cong. Rec. S1395-S1434 (March 5, 1998); 144 Cong. Rec. S1481-S1496 (March 6, 1998); 144 Cong. Rec. H2000-H2011 (April 1, 1998).

intermediate scrutiny case, the evidence must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (post-*1995 Adarand* decision striking gender-conscious legislation, Ginsburg, J., delivering 7-1 opinion of court) (emphasis added). The burden of producing it "rests *entirely* on the state." *Id.* (emphasis added). In this case, however, after reciting and accepting evidence that was not proper evidence at all, much less strong evidence of a compelling interest, the panel shifted the burden to Adarand to disprove that evidence and found that Adarand had failed to do so. App. at 50-54. Under proper strict scrutiny analysis, Adarand would have had nothing to rebut because the government had not produced the necessary evidence.

By its decision, the panel turned a blind eye to Congress' professed but constitutionally inadequate justification, even though this Court has ruled that: "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 500-501. This blind deference cannot be allowed to alter the dictates of this Court in this very case: strict scrutiny applies equally, in substance and in process, to Congress and all other governmental actors. *Certiorari* is therefore necessary to correct this conflict.

C. By Allowing A Putative New Regulatory Regime To Rescue The Compulsory Statutory Racial Presumptions From Constitutional Infirmity, The Panel Ignored That The Regulations Are Inapposite, Insufficient, Or Void.

After holding the federal race-based program to be facially constitutional, the panel held that the SCC applied those statutes unconstitutionally and enjoined its further use. App. at 59. Thereupon, the panel went on to analyze whether "the new federal regulations under TEA-21" survive "strict scrutiny." Those new regulations,

concluded the panel, solve the narrow tailoring problems of failing to attempt race-neutral alternatives and of over-inclusiveness, by requiring race-neutral alternatives, App. at 59, and by negating the presumption of economic disadvantage for DBE applicants whose net worth exceeds a specified amount. App. at 74-75. Remarkably, the panel fails to recognize that the "new federal regulations" do not apply to this case and, in any event, apply only to economic disadvantage. Further, if the regulations did apply, by nullifying the express statutory directive to presume economic disadvantage, they would themselves become unconstitutional.

1. The New Regulations Regarding Race-Neutral Alternatives Are Completely Inapposite Because They Apply To State Entities, Not To US-DOT, And To Grants, Not To Direct Procurement.

The regulations that the panel relied on in finding the statutes constitutional as applied are, in reality, completely inapposite. This case involves direct procurement of goods and services by US-DOT. As this Court noted the first time it considered this case, "the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation ([US-]DOT), awarded the prime contract for a highway construction project" to the contractor that hired Gonzales instead of Adarand. 515 U.S. 200, 204. To save the statutes from lack of narrow tailoring for failure to attempt race-neutral alternatives, however, the panel relied on the newly revised 49 C.F.R. part 26. Specifically, it quoted § 26.51 for the new rule that prime contractors "must meet the maximum feasible portion of [their] overall [racial participation] goal by using race-neutral means of facilitating DBE participation." App. at 59. The new set of regulations, however, "affects *only* the airport, transit and highway financial assistance programs of the Department[; it only]

concerns the *state and local*, rather than the federal, procurement actions." 62 F.R. 29548 (May 30, 1997) (emphasis added). In fact, in a section entitled "To whom does this part apply?," the regulations themselves plainly state, "[I]f you are letting a contract in which [US-]DOT financial assistance does not participate, this part does not apply to the contract." 49 C.F.R. § 26.3(d) (2000). This case deals exclusively with direct federal procurement and has nothing to do with financial assistance; therefore, 49 C.F.R. part 26 is irrelevant.

2. The New Regulations Regarding Presumptions Are Insufficient To Save The Statutes Because The Regulations Do Not Even Purport To Alter The Presumption Of Social Disadvantage, Leaving The Statute Unconstitutionally Over-Inclusive On Its Face.

The twin presumptions of social and economic disadvantage together render the statutory scheme over-inclusive, but the panel held that the purported alteration – of only the economic presumption – saves the statute from constitutional infirmity. The new regulations, the panel held:

> [E]liminated the discrepancy between the individualized determination of economic disadvantage characterizing the § 8(a) program and the non-individualized presumption of economic disadvantage characterizing the § 8(d) program. *See* 48 C.F.R. § 19.001 (2000) (providing that the § 8(d) program regulations expressly incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt. A); *see also* 48 C.F.R. § 19.703 (2000) (eliminating the race-based presumption of economic disadvantage of the former regulation); *id.* § 52.219-8.

App. at 74-75. Since the presumption of social disadvantage remains intact even if these regulations applied in this case, it is apparent from the panel's analysis that the statutes remain every bit as over-inclusive as ever.

3. If The New Regulations Did Apply, They Would Be Void.

It is settled law that "[r]egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larinoff*, 431 U.S. 864, 873 (1977). Therefore, since the "new regulations" the panel relies on would contravene § 8(d), they are void.

The new regulations regarding the 8(d) economic presumption, as the panel observed, "impose a new requirement on applicants with regard to an individualized showing." App. at 75. Each applicant "must submit a narrative statement describing the circumstances of that purported economic disadvantage." *Id., citing* 13 C.F.R. § 124.104(b)(1) (2000) and 49 C.F.R. §§ 26.65(b), 26.67(b)(1) (2000). The panel explains that the new regulations rescue the statute by incorporating an "automatic rebuttal" of the presumption of disadvantage, "without a requirement of further proceedings," if the applicant's "net worth is above $750,000." App. at 94.

Under § 8(d), however, and thus under TEA-21, which incorporates the presumptions of § 8(d), the presumptions of both social and economic disadvantage are mandatory: 15 U.S.C. § 637(d)(3)(C). "The contractor *shall presume* that socially *and* economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . . " *Id.* (emphasis added).

The presumption, as demonstrated by over twenty years of US-DOT practice, means that US-DOT is not permitted to require evidence from minority applicants

for DBE status unless and until some third party challenges that status. The new regulations require such evidence, even in the absence of a challenge. That evidence, however, may not be used to deny DBE status to a statutorily eligible minority individual; that eligibility is mandated by the federal statute that presumes that all members of certain races are "socially and economically disadvantaged." Moreover, this Court held in this very case that any such race-neutral regulations are "patent[ly] incompatib[le]" with § 8(d). *2000 Adarand*, 102 S.Ct. at 726. The "new regulations" therefore contravene § 8(d), would be void if they applied, and cannot rescue this program.

II. THIS CASE, NOW PENDING FOR OVER A DECADE, INVOLVES A MATTER OF EXCEPTIONAL NATIONAL IMPORTANCE THAT DEMANDS A FINAL DECISION ON THE MERITS BY THIS COURT SO THAT NUMEROUS SIMILAR CASES NOW PENDING THROUGHOUT THE FEDERAL COURT SYSTEM MAY BE DECIDED PROPERLY AND CONSISTENTLY.

The statutes at issue in this case compel race discrimination by US-DOT and by those engaged in federal highway construction. In considering racially motivated governance, this Court has long been united in its belief that race-based legislation is to be viewed as a "last resort" appropriate only in an "extreme case" because racism is so offensive to basic concepts of liberty. *Croson*, 488 U.S. at 509; *Philadelphia*, 893 F.Supp. at 424. Further, as Justice Brennan wrote, "[P]referential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection." *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-74 (1977). Justice Stevens expressed the same concern: "[A] statute of this kind

inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race [and] can only exacerbate rather than reduce racial prejudice." 448 U.S. at 545 (dissenting). Since this case involves racial preferences on the federal level, it cries out for resolution by this Court.

Further, Adarand filed the complaint in this case over ten years ago, on August 10, 1990. Since then Adarand has twice brought this case before this Court, even though there are no unresolved issues of fact. Both times, this Court deemed it prudent to allow the lower courts to resolve certain questions regarding the interplay of the statutes and regulations. *1995 Adardand*, 515 U.S. at 238. Those issues having been resolved below, Adarand now petitions this Court once again for a decision on the merits. There are no further issues of fact, and this Court is best equipped to answer any outstanding questions of law.

In addition, numerous cases now pending in the federal courts would benefit from a decision on the merits in this case. For example, to name a few, *Dynalantic Corp. v. U.S. Dept. of Defense*, 937 F.Supp. 1 (D.D.C. 1996); *Rothe Development Corp. v. U.S. Dept. of Defense*, 49 F.Supp.2d 937 (W.D.Tex. 1999); *McCrossan Construction, Inc. v. Rahn*, 96 F.Supp.2d 1238 (D.N.M. 2000). This Court should therefore grant Adarand's petition.

CONCLUSION

For all of the above reasons, Adarand respectfully requests that this Court grant this petition.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS FOR PETITION FOR *WRIT OF CERTIORARI*

Adarand v. Slater, October 2000

VOLUME I

Opinion, Tenth Circuit, filed September 25, 2000, on remand .....App. 1

Order, Tenth Circuit, filed April 5, 2000, denying petition for rehearing *en banc* .....App. 99

Order, Tenth Circuit, filed February 18, 2000, (1) recalling mandate issued on May 27, 1999, to U.S. District Court for District of Colorado and (2) vacating judgment of Tenth Circuit issued March 4, 1999 .....App. 101

Adarand Constructors, Inc. v. Slater, 120 S.Ct. 722 (2000), filed January 12, 2000 .....App. 103

Order, Tenth Circuit, filed May 19, 1999, denying petition for rehearing *en banc* .....App. 113

Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999), filed March 4, 1999 .....App. 115

Adarand Constructors, Inc. v. Slater, 965 F.Supp 1556 (D.Colo. 1997), filed June 4, 1997 .....App. 128

VOLUME II

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) .....App. 202

U.S Constitution, Fifth Amendment .....App. 293

Surface Transportation and Uniform Relocation Assistance Act (STURAA), Section 106(c), 101 Stat. 132 .....App. 294

APPENDIX TABLE OF CONTENTS – Continued

Intermodal Surface Transportation Efficiency Act (ISTEA), Section 1003(b), 105 Stat. 1919-1921 App. 295

Transportation Equity Act for the Twenty First Century (TEA-21), Section 1101(b), Public Law 105-178 ..... App. 300

Small Business Act, Section 8(d), 15 U.S.C. § 637(d)(1)-(3), (5), (6) ..... App. 305

Small Business Act, 15 U.S.C. § 644(g)(1) ..... App. 315

TC-554 ..... App. 317

13 C.F.R. § 124.1002 (2000) ..... App. 320

13 C.F.R. § 124.104(b)(1) (2000) ..... App. 324

13 C.F.R. § 124.105 ..... App. 325

48 C.F.R. § 19.001 (2000) ..... App. 330

48 C.F.R. § 19.703 (2000) ..... App. 334

48 C.F.R. § 52.219-8 ..... App. 336

49 C.F.R. § 23.41(a)(3)(i), (b), (c) ..... App. 338

49 C.F.R. § 23.64(a), (c) ..... App. 340

49 C.F.R. § 23.68(b) ..... App. 341

49 C.F.R. Part 23, Appendix A to Subpart D .. App. 342

49 C.F.R. Part 23, Appendix C to Subpart D .. App. 348

49 C.F.R. Part 23, Subpart F, § 26.107 ..... App. 350

49 C.F.R. Part 23, Subpart B, § 26.21 ..... App. 352

49 C.F.R. § 26.3(d) (2000) ..... App. 353

49 C.F.R. § 26.51 (2000) ..... App. 354

APPENDIX TABLE OF CONTENTS – Continued

49 C.F.R. Part 23, Subpart D § 26.61 ..... App. 360

49 C.F.R. § 26.65 ..... App. 361

49 C.F.R. § 26.67(b)(1) (2000) ..... App. 362

49 C.F.R. § 26.87 ..... App. 363

49 C.F.R. Part 26, Appendix E ..... App. 364

Defendants' Memorandum in Support of Their Motion for Summary Judgment, Appendix I, Civil Action No. 90-K-1413, filed May 1, 1996, U.S. District Court for the District of Colorado ..... App. 367

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

RODNEY E. SLATER, Secretary of the Department of Transportation; KENNETH R. WYKLE, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administratin; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Defendants-Appellants,

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

No. 97-1304

OPINION ON REMAND

(Filed Sep. 25, 2000)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 90-K-1413)

Leslie A. Simon, Attorney, United States Department of Justice, (Nancy E. McFadden, General Counsel, Paul M. Geier, Assistant General Counsel for Litigation, Edward V.A. Kussy, Acting Chief Counsel, Federal Highway Administration, Sara McAndrew, Trial Attorney, Peter S. Smith, Trial Attorney, of the United States Department of Transportation, Washington, D.C.; Isabelle Katz Pinzler, Acting Assistant Attorney General, William R. Yeomans, Acting Deputy Assistant Attorney General, Bill Lann Lee, Acting Deputy Assistant Attorney General, Thomas E. Perez, Deputy Assistant Attorney General, Mark L. Gross, Attorney, Louis E. Peraertz, Attorney, of the United States Department of Justice, Washington, D.C., with her on the briefs), for Defendants-Appellants.

William Perry Pendley (Todd S. Welch and J. Scott Detamore, with him on the briefs), Mountain States Legal Foundation, Denver, Colorado, for Plaintiff-Appellee.

Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., for Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief.

Julian A. Gross and William C. NcNeill III, Legal Aid Society of San Francisco, for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie Anita Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

Before **LUCERO**, Circuit Judge, **McKAY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

LUCERO, Circuit Judge.

Following the Supreme Court's vacation of our dismissal on mootness grounds, we address the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, we must resolve the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). Our evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) ("*Adarand III*").

In his concurring opinion in *Adarand III*, Justice Scalia succinctly articulated this Nation's guiding aspiration: "In the eyes of government, we are just one race here. It is American." *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment). Until that future day when

national aspiration and national reality converge, the Court has made clear that under certain circumstances the federal government may use race-conscious means to remedy the effects of historical and present-day racial discrimination. Inherently, we resolve whether the two branches of the government – the Legislative and the Executive – that have chosen to hasten that future day have met the constitutional standards enunciated by the third branch. Since the district court last considered this case, and after lengthy congressional hearings in response to the *Adarand III* decision, the federal government has significantly changed the way in which it implements the challenged race-conscious programs in highway construction contracting. It is ultimately our considered judgment that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, pass constitutional muster: They are narrowly tailored to serve a compelling governmental interest. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse the judgment of the district court below.

I

The Supreme Court has characterized the facts of this case as "fairly straightforward," *Adarand III*, 515 U.S. at 206, summarizing the relevant facts as follows:

> In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

Id. at 205. At the time, Gonzales was certified as a small business owned and controlled by socially and economically disadvantaged individuals, while Adarand was not. *See id.* This litigation centers around the SCC, a clause which was included in CFLHD's prime contract with Mountain Gravel. The SCC provided "that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals.' " *Id.* (citation omitted).

Adarand submitted an affidavit stating that but for the additional compensation Mountain Gravel obtained by hiring Gonzales, a certified business, it would have hired Adarand for the guardrail work. *See id.* Adarand sued, arguing that the use of a race-conscious presumption in determining who is a socially and economically disadvantaged individual for purposes of the SCC violated its Fifth Amendment equal protection rights. *See id.* at 205-06.

In *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992) (*"Adarand I"*), the district court addressed Adarand's challenge to "the DBE program as administered by the CFLHD within Colorado." *Id.* at 241 (footnote omitted). Without focusing specifically on the SCC and its operation, the court in *Adarand I* upheld as

constitutional, under intermediate scrutiny, statutory provisions defining DBEs and setting goals for DBE participation in government contracting. *See id.* at 241, 244-45 (relying on *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 598-601 (1990)).

In *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1539 (10th Cir. 1994) (*"Adarand II"*), this Court affirmed the district court's judgment on different grounds. We concluded that Adarand had standing to challenge the SCC program as it pertains to minority business enterprises but not women-owned business enterprises and addressed our inquiry to the SCC as a program implemented pursuant to § 502 of the Small Business Act of 1958 ("SBA"), Pub. L. No. 85-536, 72 Stat. 384 (codified as amended, 15 U.S.C. § 631 *et seq.*). *See Adarand II*, 16 F.3d at 1543 (citing 15 U.S.C. § 644(g)). Like the district court, we relied on *Metro Broadcasting*, 497 U.S. at 565, applying intermediate scrutiny to the SCC and holding "the SCC program . . . constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small [DBEs], as required under section 502 of the [SBA]." *Adarand II*, 16 F.3d at 1547.

The Supreme Court reversed. It overruled *Metro Broadcasting* and cast doubt on *Fullilove* insofar as that case might be read to apply less than strict scrutiny to

federal programs involving racial classifications. *See Adarand III*, 515 U.S. at 227, 235.[1]

On remand, the district court held the SCC program unconstitutional, finding it insufficiently narrowly tailored to further a compelling interest because the program was both over- and under-inclusive, including minority individuals who were not in fact disadvantaged and excluding non-minority individuals who were disadvantaged. *See Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556 (D. Colo. 1997) (*"Adarand IV"*). With regard to the Court's pronouncement in *Adarand III* that strict scrutiny is not "fatal in fact," the district court found it "difficult to envisage a race-based classification" that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact. *Id.* at 1580. The district court granted summary judgment to Adarand.

Following *Adarand IV*, we considered the government's contention that subsequent events had rendered the case moot. *See Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999) (*"Adarand V"*). Specifically, because Adarand applied for and was granted DBE certification by the Colorado Department of Transportation

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[1] The principal focus of *Adarand III* was not an analysis of the particular statutes and regulations before the Court under its newly-announced standard, but the far more abstract question of whether "benign" race-conscious programs are subject to the "strict scrutiny" doctrine, a question which the majority answered in the affirmative. *See Adarand III*, 515 U.S. at 225-27. In its enunciation of the strict scrutiny standard and its overruling of *Metro Broadcasting*, the Court accorded very little attention to the application of the strict scrutiny test to the particular programs at issue in this case.

("CDOT"), we concluded that Adarand could no longer demonstrate an injury stemming from the SCC sufficient to confer standing. *See id.* at 1296-97. Hence, the case was moot. *See id.*

The Supreme Court disagreed. *See Adarand Constructors, Inc. v. Slater*, 120 S. Ct. 722 (2000) (*"Adarand VI"*). Relying on its decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), handed down on the same day as its *Adarand VI* remand, the Court stated it had "recently noted" that a possibility of a defendant "engag[ing] in (or resum[ing]) harmful conduct" might be too speculative to confer standing but not too speculative to overcome mootness. *Adarand VI*, 120 S. Ct. at 726 (quoting *Friends of the Earth*, 120 S. Ct. at 699). The Court held it was "far from clear" that DOT would not initiate proceedings to revoke Adarand's status and because "it is impossible to conclude that respondents have borne their burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' petitioner's cause of action remains alive." *Id.* at 726-27 (quoting *Friends of the Earth, Inc.*, 120 S. Ct. at 708). With the reversal of our judgment in *Adarand V*, this appeal was remanded to us for consideration on the merits. *See id.* at 726-27.

In the discussion that follows, we first dispose of three threshold concerns: (1) a determination of the appropriate versions of the statutes and regulations at issue in this case; (2) the scope of our review of the SCC program; and (3) a brief overview of the relevant statutory framework and of the SCC program. Then, in Part III we subject the SCC program to strict scrutiny, examining

the compelling interest underlying the program as well as its narrow tailoring, and addressing specific issues that the Supreme Court in *Adarand III* directed that we consider. Finally, in Part IV, we briefly discuss the government's request that we consolidate with the instant action a pending, potentially related case, originally filed under the name *Adarand Constructors, Inc. v. Romer*, No. CIV. A. 97-K-1351 (D. Colo. June 26, 1997).

II

We begin by addressing the scope of our inquiry in this appeal. It is essential that we decide which versions of the statutes and regulations at issue are properly before us, as well as which portions of those statutes and regulations are relevant to this appeal.

Several statutes are implicated in this case, notably §§ 8(a), 8(d) and 502 of the SBA (codified as amended at 15 U.S.C. §§ 637(a), (d), and 644(g)), § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987), § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914, 1919-21 (1991), § 1101(b) of the Transportation Equity Act for the 21st Century of 1998 ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, 113-15 (1998), as well as their accompanying administrative regulations.

A. The Versions To Be Considered

With regard to the foregoing statutes, regulations, and SCC, the parties disagree as to whether we may properly consider intervening changes in the law between 1992 when *Adarand I* was handed down and the present.[2] Our resolution of that dispute is ultimately compelled by the logic of the well-settled precedent of both the Supreme Court and this Circuit. Adarand seeks only prospective declaratory and injunctive relief. *See Adarand III*, 515 U.S. at 210.[3] Application of the intervening statutory and regulatory changes to this type of claim does not implicate any presumption against the retroactive application of statutes. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) ("Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute . . . affects the propriety of prospective relief, application of the new provision is not retroactive."); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1149 (10th Cir. 1999) (applying *Landgraf*), *cert. denied sub nom. Palaganas-Suarez v. Greene*, 120 S. Ct. 1539 (2000); *see*

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[2] We have therefore requested and received supplementary briefing from the parties on intervening changes in the statutory and regulatory scheme at issue in the instant action.

[3] Although Adarand also seeks "such other and further relief as to the Court seems just and equitable," this highly general language does not constitute a prayer for retrospective relief under the circumstances of this case. (Appellants' App. at 10.) Moreover, on appeal Adarand seeks to uphold the district court's grant of summary judgment and declaratory and injunctive relief and has not filed a cross-appeal seeking damages or another form of retrospective relief.

also Jones v. Hess, 681 F.2d 688, 695 n.9 (10th Cir. 1982) ("Generally an appellate court must apply the law in effect at the time it renders its decision where a change in law occurs while a case is on direct appeal, although there may well be an exception to this rule to prevent manifest injustice." (citations omitted)); *McMahan v. Hunter*, 179 F.2d 661, 663 (10th Cir. 1950) ("[W]here a rule of law was changed after the decision in the trial court but before the decision in the Appellate Court, the decision in the Appellate Court must be according to the new law."); 13A Charles Alan Wright et al., *Federal Practice & Procedure, Jurisdiction* 2d § 3533.6 (1984) ("Ordinarily, courts . . . apply[ ] the law in force at the time of decision, unless a good reason appears for ignoring the change."); *cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990). To ignore intervening changes in the statutory and regulatory framework underlying this litigation would be to shirk our responsibility to strictly scrutinize the real-world legal regime against which Adarand seeks prospective relief. The changes in the law are squarely before us today, and we discern no reason to leave their scrutiny to future litigation, in effect prolonging the instant litigation and fostering "both a wasteful expenditure of resources by courts and litigating parties and the gradual undermining of public confidence in the judiciary – in short, Dickens's *Jarndyce v. Jarndyce* syndrome." *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000).

However, considering that we are reviewing a decision of the district court below that relied on older versions of the statutes, regulations, and SCC, and because we are mindful that future statutory and regulatory

changes may cause the government to "engage in (or resume) [the] harmful conduct" in question earlier in this litigation so as to militate against a finding of mootness, *Adarand VI*, 120 S. Ct. at 726 (quoting *Friends of the Earth*, 120 S. Ct. at 699), we consider the statutory and regulatory framework in its prior stages as well.[4] *See also Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982))). It is not

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[4] Thus, we refuse the government's invitation to ignore the SCC program by virtue of its citation to a March 29, 2000 memorandum from the Manager of the Federal Lands Program indicating that the SCC is no longer in use in federal highway construction procurement contracts. We likewise reject the government's argument, relying on *Lawrence v. Chater*, 516 U.S. 163, 165-66 (1996), that we must remand this case to the district court for consideration of intervening statutory and regulatory changes. The government's reliance on *Lawrence* is misplaced: That case involved the Supreme Court's exercise of its power to "grant certiorari, vacate the judgment below, and remand the case" to a *"lower federal court"* in light of intervening regulatory changes, and not the power of a lower federal court to decide a case on remand from the Supreme Court. *Id.* (emphasis added). In the present case, the parties have briefed intervening changes in the law, there are no disputed factual issues, and we see no reason to delay this already protracted litigation by remanding to the district court, especially considering the district court's statement that it would be "difficult to envisage a race-based classification" that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact, *Adarand IV* 965 F. Supp. at 1580, a view which we reject in the discussion that follows.

fanciful to suggest that the government may retreat to prior practice, but if the government did so, this opinion expressly holds that such an action would be unconstitutional for the reasons discussed below.

B. The Scope of the SCC Program Under Scrutiny

We next clarify the scope of the SCC program under review. In that regard, we are bound by the Supreme Court's ruling on Adarand's standing in *Adarand III* as law of the case. Based on its conclusion that "CFLHD is likely to let contracts involving guardrail work that contain a[n][SCC] at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses," the Court held Adarand has standing to challenge "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause." *Adarand III*, 515 U.S. at 212-13 (citation omitted).

We recognize, however, that there are programs that the Supreme Court did *not* hold Adarand has standing to challenge. First is the § 8(a) program, discussed below. *See* 15 U.S.C. § 637(a). Subsection 8(a) does not involve the use of SCCs, nor has Adarand made any showing that it has been injured by non-inclusion in the § 8(a) program. Second, we specifically held in *Adarand II* that Adarand has not shown standing to challenge "the provisions of the SCC program pertaining to women-owned business enterprises (WBE)." 16 F.3d at 1543. This conclusion was left undisturbed by the Supreme Court, *see Adarand III*, 515 U.S. at 210-12, and remains law of the

case, and we discern no clear error in that prior decision or manifest injustice sufficient to warrant overriding the law of the case doctrine, *see Agostini v. Felton*, 521 U.S. 203, 236 (1997); *McIlravy*, 204 F.3d at 1034-35. Furthermore, our decision in *Adarand II*, as well as the Supreme Court's remand in *Adarand III*, was limited to the question of the constitutionality of the use of a race-conscious presumption in the SCC program. *See Adarand III*, 515 U.S. at 237-38. This case does not involve, nor has Adarand ever demonstrated standing to bring, a generalized challenge to the policy of maximizing contracting opportunities for small disadvantaged businesses set forth in 15 U.S.C. §§ 637 and 644(g), or to the various goals for fostering the participation of small minority-owned businesses promulgated pursuant to 15 U.S.C. § 644(g), also discussed below. Nor are we presented with any indication that Adarand has standing to challenge paragraphs (4)-(6) of 15 U.S.C. § 637(d). Finally, we agree with the government that throughout the course of this litigation, Adarand's challenge has been to the use of the SCC in direct federal highway procurement contracts entered into by the CFLHD with funds appropriated under STURAA, ISTEA, and TEA-21. In the discussion that follows, we therefore address the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. To the extent the district court's judgment can be construed as having reached statutes, programs, and issues beyond the scope of Adarand's standing and the Supreme Court's remand in *Adarand III*, we reverse that judgment.

C. Overview of the Statutory Framework and the SCC

We are now in a position to offer a brief overview of the statutory framework and the SCC underlying this litigation.

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The [SBA] defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).
>
> In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-

> specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Id.*

Adarand III, 515 U.S. at 206. These goals must "realistically reflect the potential" of small disadvantaged businesses to perform subcontracts. *See* 15 U.S.C. § 644(g)(2), (h)(1). Under both § 8(a) and § 8(d), subcontractors can be certified as DBEs, qualifying them for the SCC program at issue in this litigation.

STURAA, ISTEA, and TEA-21, the transportation appropriations statutes at issue in this case, incorporate the presumption of disadvantage from SBA § 8(d). *See* STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B); TEA-21 § 1101(b)(2)(B) (providing that the term "socially and economically disadvantaged individuals" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto."). STURAA, ISTEA, and TEA-21 all set forth aspirational goals of 10% DBE participation in federal subcontracting. *See* STURAA § 106(c)(1); ISTEA § 1003(b)(1); TEA-21 § 1101(b)(1).[5]

The SCC is a means of implementing the various statutory goals and directives at issue in this litigation. This clause provides a financial bonus of up to 10% of an approved subcontract (no more than 1.5% or 2% of the original contract, depending on how many DBEs are employed) to a prime contractor for employing a DBE. (*See* Appellants' App. at 55-56.) Subcontractors must be

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[5] The relevant statutes have remained unchanged in all respects material to this litigation from 1992 to the present, except as noted in the Appendix to this opinion.

certified as DBEs by "the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer" pursuant to the "[§] 8(a) or [§] 8(d) program, or certification by a State under the DOT regulations." *Adarand III*, 515 U.S. at 209-10. In November of 1997, the SCC at issue in *Adarand IV* was revised, leaving the basic framework in place. At present, the government maintains, and Adarand does not dispute, that SCCs are no longer in use. (*See* Appellants' Supp. Br. Attach. 1.)

A discussion of the complex, cumbersome, and changing regulations promulgated pursuant to the foregoing statutes, as well as a more thorough summary both of the statutory framework itself and of the SCC, is incorporated as an Appendix to this opinion. Otherwise, changes in the relevant portions of the regulations and SCC are discussed in our application of the strict scrutiny standard that follows.

III

In reviewing the district court's grant of summary judgment to Adarand, we employ our customary standard of review:

> We review a grant of a motion for summary judgment de novo, applying the same legal standard used by the district court. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

> Fed. R. Civ. P. 56(c). We view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Byers*, 150 F.3d at 1274.

McGarry v. Board of County Comm'rs, 175 F.3d 1193, 1198 (10th Cir. 1999). At the very outset, before immersing ourselves in the intricacies of the issues before us, we emphasize our substantial agreement with much of the district court's judgment as it pertains to the versions of the statutes and regulations in place in 1996. Insofar as the court's judgment does not exceed the proper scope of its review and with the significant caveat that we disagree both with the court's conclusion regarding the fatality in fact of strict scrutiny and with its ultimate result in light of the current version of the relevant regulations, we take the district court's view of the matter. And we share wholeheartedly its sentiment that the time has come for this litigation to come to an end. *See Adarand IV*, 965 F. Supp. at 1558.

A. Evolution of Strict Scrutiny Standards

The Supreme Court's declarations in the affirmative action area are characterized by plurality and split opinions and by the overruling of precedent. This fractured prism complicates the task of lower courts in both identifying and applying an appropriate form of equal protection review. We therefore begin our analysis with a brief review of what we understand to be the current state of the law in this area.

Twenty years ago, the Supreme Court addressed a direct precursor of the statutes at issue today in *Fullilove*,

448 U.S. at 448. Although *Fullilove* failed to produce a majority opinion, six Justices voted to affirm the program at issue – the "minority business enterprise" ("MBE") provision of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, § 103(f)(2). *See Fullilove*, 448 U.S. at 453. The MBE provision required that, subject to waiver by the Secretary of Commerce, "no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." *Id.* at 454 (quoting 42 U.S.C. § 6705(f)(2) (1976 ed., Supp. II)). For purposes of the MBE set-aside, MBEs were defined as businesses owned and controlled by individuals who could be classified as "Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts." *Id.* (quoting 42 U.S.C. § 6705(f)(2)). The MBE program was a mandatory set-aside; under the relevant regulations, a request for waiver could be granted, among other circumstances, if a minority business enterprise quoted an "unreasonable" price. *Id.* at 470-71 (internal quotation and citation omitted).

Chief Justice Burger, joined by Justices White and Powell, applied what appears to be a more deferential standard than what the Court often terms "strict scrutiny":

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to " 'provide for the . . . general

> Welfare of the United States' and 'to enforce, by appropriate legislation,' " the equal protection guarantees of the Fourteenth Amendment.

Id. at 472 (quoting U.S. Const., art. I, § 8, cl. 1); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487 (1989) (Op. of O'Connor, J.) ("The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review.").

Adarand III, 515 U.S. at 235, cast doubt on *Fullilove*. "[T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it." *Id.* We interpret that statement in *Adarand III* as precluding reliance on *Fullilove* for either the standard of review or the result in this case. Otherwise, the programs at issue here would almost certainly pass muster under the *Fullilove* standard because, in furtherance of substantially similar goals, the programs before us impose a significantly more flexible and less intrusive remedy – a voluntary subsidy as opposed to a fixed set-aside subject to waiver.[6]

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[6] We note that the *Adarand III* Court's qualified repudiation of *Fullilove* would appear to leave in place other aspects of that case, most notably its factual determinations regarding congressional findings and the legislative history of the SBA discussed in the Chief Justice's opinion and further elaborated upon in the concurring opinion of Justice Powell. *See Croson*, 488 U.S. at 488 (Op. of O'Connor, J.) ("In reviewing the legislative history behind the Act, the principal opinion focused on the

In 1989 the Court produced a majority for a portion of an affirmative action opinion. *See Croson*, 488 U.S. at 469. In *Croson*, the Court struck down under strict scrutiny a municipal plan requiring "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more [MBEs]." *Id.* at 477. In so doing, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, rejected the competing arguments that a state's power to remedy racial discrimination is equal to that of Congress under § 5 of the Fourteenth Amendment and that the Fourteenth Amendment effectively preempts state action in matters of race. *See id.* at 489-93 (Op. of O'Connor, J.).[7] A plurality of the Court then proceeded to reject the proposition that the level of scrutiny varies in cases of "benign" and invidious racial classifications, noting that black Americans constituted a controlling political majority in the city of Richmond, a fact militating

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evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants.") (citing *Fullilove*, 448 U.S. at 458-67 (Op. of Burger, C.J.)); *id.* at 489 (citing the concurring opinion of Powell, J., in *Fullilove*). Thus, where Fullilove's factual findings bear on the factual underpinnings of this case, we so note in the discussion that follows. The separate question of whether those findings are adequately supported by evidence, pursuant to *Adarand III*'s application of *Croson* to federal race-conscious programs, is one we consider at length in Subsection B below.

[7] Despite overruling *Metro Broadcasting* and casting doubt on *Fullilove*, the majority opinion in *Adarand III* firmly rejected the suggestion "that any Member of this Court has repudiated in this case his or her previously expressed views on the subject" of Congress's powers under § 5 of the Fourteenth Amendment. *Adarand III*, 515 U.S. at 231.

against the application of a more deferential standard of review. *Id.* at 495-96 (Op. of O'Connor, J.).

What did produce a clear majority in *Croson* was the proposition that "the factual predicate offered in support of the Richmond Plan suffers from the two defects identified as fatal in *Wygant [v. Jackson Board of Education*, 476 U.S. 267 (1986)]," *Croson*, 488 U.S. at 498, namely, failure to make findings specific to the market to be addressed by the remedy and to provide limits to the scope of that remedy due to only generalized findings of discrimination.[8] The Court stated that "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." *Id.* at 499. In particular, the majority noted it was "sheer

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[8] *Croson* cannot be read, as Adarand would have it, as standing for the proposition that findings of "the present effects of past discrimination in the construction industry," 488 U.S. at 498 (citation omitted), are automatically insufficient to justify remedial action. This characterization of *Croson* overlooks a very significant difference between the Richmond Plan at issue in *Croson* and the congressional enactments at issue in the instant case. The City of Richmond had no authority to remedy the present effects of past discrimination in the entire construction industry nationally, and the City was not permitted to simply infer that congressional findings as to the entire industry applied equally to the particular market within its jurisdiction. *See id.* at 504-05. The remediation of nation-wide problems, however, is particularly within the purview of Congress, and findings of industry-wide discrimination are precisely what is relevant to a federal decision to undertake remedial action. *See id.* at 490, 504.

speculation" to simply guess how many firms there would be absent past discrimination and "[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone." *Id.*

After noting the City of Richmond's failure to link its remedial program to specifically identified past discrimination, the *Croson* majority made two additional observations explaining why the City's program was not narrowly tailored. *See id.* at 507. First, the Court noted "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." *Id.* (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)). The Court suggested that race-neutral programs of municipal financing for small firms might increase minority participation without the use of a direct racial preference. *See id.*

Second, the Court declared "[t]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

Adarand III, 515 U.S. at 235 (citing *Fullilove*, 448 U.S. at 496 (Powell, J., concurring)), followed and held that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Now, informed by the Supreme Court's directives pertaining to remand, and its multifaceted jurisprudence on affirmative action

programs, we turn to the task of assessing the application of racial presumptions in the SCC program under a strict scrutiny standard.

B. Compelling Interest

We "decide the question [of] whether the interests served by the use of [SCCs] are properly described as 'compelling.' " *Adarand III*, 515 U.S. at 237. In so doing, our inquiry necessarily consists of four parts: First, we must determine whether the government's articulated goal in enacting the race-based measures at issue in this case is appropriately considered a "compelling interest" under the governing case law; if so, we must then set forth the standards under which to evaluate the government's evidence of compelling interest; third, we must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and finally, we must examine wether the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper. We begin, as we must, with an inquiry into the meaning of "compelling interest."

1. "Compelling Interest" in Race-Conscious Measures Defined

We know from *Adarand III* that, as a general proposition, there may be a compelling interest that supports the enactment of race-conscious measures. Justice O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination

against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (citing *Croson*, 488 U.S. at 498-506)). Interpreting *Croson*, we have recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ' "passive participant" in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.' " *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (quoting *Croson*, 488 U.S. at 492).

The government identifies the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." (Appellants' Br. at 21.) The district court in *Adarand IV*, 965 F. Supp. at 1572, held this interest is properly described as compelling, reasoning that "it appears that Justice O'Connor's assertion in *Croson*, that Congress has the ability under Section 5 [of the Fourteenth Amendment] to recognize and address racial discrimination, has been left undisturbed." Although we decline to address the precise relationship between § 5 of the Fourteenth Amendment and the power of Congress, acting through the Executive branch, to address racial discrimination by

the states, we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *See Croson*, 488 U.S. at 492 (Op. of O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973))); *Norwood*, 413 U.S. at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

In its brief, Adarand cites general language from *Adarand III* in an attempt to limit the permissible scope of Congress's power to redress the effects of racial discrimination, ignoring the substantial differences between the scope of problems to be addressed by Congress and those to be addressed by a city council such as that in *Croson*. The fact that Congress's enactments must serve a compelling interest does not necessitate the conclusion that the scope of that interest must be as geographically limited as that of a local government. *See Croson*, 488 U.S. at 489 (Op. of O'Connor, J.).[9] Although there is not a clear

[9] *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), cited by appellee, is distinguishable both in that it involved a city-based rather than a nationwide program, and in that the program at issue was based on far scantier evidence than that available in the instant case.

majority on the Court for the proposition that § 5 of the Fourteenth Amendment grants Congress broad remedial powers in the area of discrimination, in Section II of Justice O'Connor's opinion in *Croson*, Justice O'Connor and Chief Justice Rehnquist endorsed that proposition. *See Croson*, 488 U.S. at 490 ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate."). The geographic scope of Congress's reach in this regard is "society-wide" and therefore nationwide. *See id.*[10]

[10] The parties and their respective amici curiae differ sharply as to the relevant geographical scope to be considered in assessing the government's basis in evidence for concluding that race-conscious remedial action is necessary. Adarand and its amici argue based on *Croson* for the necessity of findings regarding both discrimination and the availability of qualified DBEs in a particular local market as a necessary prerequisite to any government action. We disagree, concluding that the absence of such findings is more properly addressed in this case under the rubric of narrow tailoring. Quite apart from the question of Congress's power under § 5 of the Fourteenth Amendment left unresolved by the *Adarand III* majority, *see Adarand III*, 515 U.S. at 230-31, the compelling interests to be addressed by Congress, whether under the Commerce Clause, Spending Clause, or Fourteenth Amendment, are necessarily different in geographic scope than those properly addressed by a city. *See, e.g., Croson*, 488 U.S. at 505 (focusing on lack of "identified discrimination in the Richmond construction industry"); *Concrete Works*, 36 F.3d at 1520 (identifying "the six-county Denver Metropolitan Statistical Area" as one acceptable geographical region for inquiry into an affirmative action measure by the City and County of Denver). That said, Adarand's concern with the availability of DBEs in a particular market is certainly an important one, *see Croson*, 488 U.S. at 502,

2. Evidence Required to Show Compelling Interest

While the government's articulated interest is compelling as a theoretical matter, we must yet determine whether the actual evidence proffered by the government supports the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. Generally,

> [a]bsent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are . . . in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool.

Id. at 493 (Op. of O'Connor, J.); *see also Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)) (further citations omitted)).

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and, as discussed below, the lack of evidence provided by the government regarding local availability and the government's concomitant failure to tailor contracting regulations accordingly constitute one of the chief barriers to finding the previous statutory and regulatory scheme narrowly tailored.

Our "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.' " *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *See Concrete Works*, 36 F.3d at 1520-21.

> Although Croson places the burden of production on the [government] to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before [the government] may take affirmative steps to eradicate discrimination.

Id. at 1522 (citing *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring)). After the government's initial showing, the burden shifts to Adarand to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (quoting *Wygant*, 476 U.S. at 277-78 (plurality)). "[T]he nonminority [challengers] . . . continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* at

1522-23 (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring)).

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, we consider both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *See Concrete Works*, 36 F.3d at 1521, 1529 n.23 (considering post-enactment evidence).[11] Furthermore, we may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *See Id.* at 1523, 1529; *see also Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

It is with the foregoing principles in mind that we turn to an examination of the evidentiary basis on which Congress relied to support its finding of discrimination and continuing effects of past discrimination against minorities in the publicly-funded and private construction industry.

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[11] Post-enactment evidence is particularly relevant when, as here, it was gathered specifically to respond to the Supreme Court's *Adarand III* decision, which applied a new compelling interest standard to the federal government's affirmative action programs. *See Appendix – The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050 (1996) (noting purpose of responding to *Adarand III*).

3. Evidence in the Present Case

There can be no doubt that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts – especially construction contracts – necessitating a race-conscious remedy. *See, e.g., Appendix – The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-52 & nn.12-21 (1996) (*"The Compelling Interest"*) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered.

Of course, statements made with regard to discrimination in the subcontracting industry by congressional reports and by members of Congress are insufficient in themselves to support a finding of compelling interest. We must probe more deeply into the legislative history of the enactments at issue. We cannot merely recite statements made by members of Congress alleging a finding of discriminatory effects and the need to address those effects, such as the following:

> Where there are no DBE programs, women and minority-owned small businesses are shut out of the highway construction. The Federal DBE program serves to redress the inequality and redress the unfortunate fact that all across the country women and minorities would not otherwise have access to construction contracts.

144 Cong. Rec. S1421 (March 5, 1998) (statement of Sen. Moseley-Braun). Such findings are not enough to satisfy strict scrutiny standards. *See Croson*, 488 U.S. at 500 ("[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." (citing *McLaughlin v. Florida*, 379 U.S. 184, 190-92 (1964))). The question that Croson requires us to ask is whether there is a strong basis in evidence to support the legislature's conclusion.

In *Concrete Works*, we noted that

> Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson*, 488 U.S. at 492. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Concrete Works, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the

federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. Discussion of each of those bodies of evidence follows.[12]

a. Barriers to Minority Business Formation in Construction Subcontracting

As to the first kind of barrier, the government's evidence consists of numerous congressional investigations

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[12] In the discussion that follows, we take judicial notice of the content of hearings and testimony before the congressional committees and subcommittees cited by the government. Furthermore, we note in passing that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by the government. *See, e.g., Barriers to Full Minority Participation in Federally Funded Highway Contracts: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th Cong. (April 1, 1998); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Commerce, Consumer, & Monetary Affairs Subcomm. of the House Comm. on Gov't Operations*, 103d Cong. (July 12, 1993).

and hearings as well as outside studies of statistical and anecdotal evidence – cited and discussed in *The Compelling Interest*, 61 Fed. Reg. 26,054-58 – and demonstrates that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide.

The evidence demonstrates that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks – based on a familial history of participation in the subcontracting market – from which minority firms have traditionally been excluded. *See* H.R. Rep. 103-870 15 n.36 (1994) ("[T]he construction industry is . . . family dominated. Many firms are in their second or third generation operating structures. Minorities and women, unless they are part of construction families, have been and will continue to be excluded whenever possible."); *The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislative & Nat'l Sec. Subcomm. of the House Comm. on Gov't Operations*, 100th Cong. 111 (1990) (*"The Significance of Croson"*) (statement of Manuel Rodriguez, President, R & D Development, Inc., specializing in mechanical construction, and past president and founder of the National Hispanic Association of Construction Enterprises) ("[F]ew [minorities] today have families from whom they can inherit a construction business."); *see also Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 & H.R. 1807 Before the Senate Comm. on Small Bus.*, 100th Cong. 127 (1988) (statement of Parren Mitchell, Chairman, Minority Business Enterprise Legal

Defense and Education Fund) (noting the "harsh reality" of the "old-boy network" that prevents minority-owned firms from breaking into the private sector); H.R. Rep. No. 103-870 15 & n.36 (1994) (discussing evidence of the discriminatory exclusion of minority firms from business networks); *The Compelling Interest*, 61 Fed. Reg. at 26,057 & nn.82-83 (citing studies explaining minorities' exclusion from the construction trades as a result of the lack of familial connections).

Furthermore, subcontractors' unions place before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *See Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 99th Cong. 203 (1985) (testimony of James Haughton, President, Fight Back) (minority contractors continue to "suffer[ ] very heavily because they have been victims to that discrimination as practiced by the unions"); *The Significance of Croson* at 117-19 (statement of Manuel Rodriguez) (describing the way in which union discrimination prevents access to skills and experience needed to form a business); *The Compelling Interest*, 61 Fed. Reg. at 26,055-56 & nn.53 & 62 (citing studies of statistical and anecdotal evidence finding racism by construction trade unions in several cities and states and concluding that racism is a major cause of the lack of minority business formation in the construction industry).

The government's evidence is particularly striking in the area of the race-based denial of access to capital,

without which the formation of minority subcontracting enterprises is stymied. *See, e.g., Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Fin. Insts. Supervision, Regulation & Deposit Ins. of the House Comm. on Banking, Fin. & Urb. Affs.*, 103d Cong. 19-20 (1994) (statement of Toni Hawkins, Executive Director, National Black Business Counsel) (noting the existence and examples of discrimination in business lending); *id.* at 27 (statement of Wayne Smith, Chairperson, Black Urban Alliance: African American Chamber of Commerce of Newark, NJ) (stating that while perhaps more subtle than discrimination in mortgage lending, discrimination in business lending exists); *id.* at 209 (statement of M. Harrison Boyd, President/CEO, HBA Management Services Group, Inc.) (White bank employees "have been, and are continually, programmed to perceive minority business loans as bad business, and/or at a minimum, risky and less desirable."); H.R. Rep. No. 103-870 7 (1994) ("There is a widespread reluctance on the part of the commercial banking, venture capital, . . . and capital markets to take the same risk with a [minority] entrepreneur that they would readily do with a white one." (quoting testimony of Sherman Copelin, President of the National Business League)); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation, and Minority Enter. Dev. of the House Comm. on Small Bus.*, 100th Cong. 26 (1988) (statement of Joann Payne, President, PSM Consultants) ("[B]ecause of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans. . . . "); *The Disadvantaged Business*

Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the Senate Comm. on Env't & Pub. Works, 99th Cong. 363 (1985) (statement of James K. Laducer, Director, North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center) (North Dakota banks "refuse to lend monies to minority businesses from nearby Indian communities."); *Fiscal Economic & Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing, & Urb. Affs.*, 102d Cong. 431 (1992) (statement of Anthony Robinson, President, Minority Business Enterprise Legal Defense and Education Fund) ("[T]he legitimate capital needs of the minority business community are ignored or held to such a higher underwriting standard and systematically denied venture capital."); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Bus.*, 102d Cong. 89 (1991) (statement of Joshua I. Smith, Chairman, U.S. Commission on Minority Business Development) (attaching *Interim Report 1990* of the United States Commission of Minority Business Development, which states minority business owners' "access to credit ha[s] been historically limited"); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the Gen. Econ. & Minority Enter. Dev. of the House Comm. on Small Bus.*, 101 Cong. 26 (1989) (statement of Cleveland M. Chapman, President, Midwest Contractors For Progress) (citing statistics demonstrating discrimination in lending in Chicago). For example, "[t]he average loan to a black-owned construction firm is $49,000 less than the average loan to an equally matched nonminority construction firm." *The Compelling Interest*, 61 Fed. Reg. at 26,058 &

n.91 (citing Grown & Bates, *Commercial Bank Lending Practices & the Development of Black-Owned Construction Companies.*, 14 J. Urb. Aff. at 34 (1992)). "All other factors being equal, a black business owner is approximately 15 percent less likely to receive a business loan than a white owner." *Id.* at 26,058 & n.90 (citing Faith Ando, *Capital Issues and the Minority-Owned Business*, 16 Rev. Black Pol. Econ. at 97 (1988)). Another study

> surveyed 407 business owners in the Denver area. It found that African Americans were 3 times more likely to be rejected for business loans than whites. The denial rate for Hispanic owners was 1.5 times as high as white owners. Disparities in the denial rate remained significant even after controlling for other factors that may affect the lending rate, such as the size and net worth of the business. The study concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample (Black, Hispanic and Anglo) were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial."

Id. at 26,058 (footnotes omitted) (citing The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver* v (1996)). Such findings strongly support an initial showing of discrimination in lending; and we take judicial notice of the obvious causal connection between access to

capital and ability to implement public works construction projects.[13]

b. Barriers to Competition by Existing Minority Enterprises

With regard to barriers faced by existing minority enterprises, the government presents evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts.

The government presents powerful evidence that

> [a]ll too often, contracting remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work. Because minority owned firms are new entrants to most markets, the existence and proliferation of these relationships locks them out of subcontracting opportunities. As a result, minority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements.

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[13] Lending discrimination alone of course does not justify action in the construction market. *See Croson*, 488 U.S. at 510 (Op. of O'Connor, J.) (noting a municipality's alternative remedy of taking direct action against discrimination in the provision of credit). However, the persistence of such discrimination, which is *already* unlawful under federal law, supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.

The Compelling Interest, 61 Fed. Reg. 26,058 & nn.98-99 (footnotes omitted) (citing studies of statistical and anecdotal evidence of minority business participation in state and local construction industries). The government has also presented sobering evidence that

> when minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. This sort of exclusion is often achieved by white firms refusing to accept low minority bids or by sharing low minority bids with another subcontractor in order to allow that business to beat the bid (a practice known as "bid shopping").

Id. at 26,058-59 (citing studies of statistical and anecdotal evidence detailing bid shopping in several localities).

It is clear to us that Congress has devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of the non-minority firms in the construction industry. *See, e.g., How State and Local Governments Will Meet the Croson Standard (Minority Set-Asides): Hearing Before the Subcomm. on Civ. & Const. Rights of the House Comm. on the Judiciary*, 100th Cong. 53-54 (1989) (statement of Marc Bendick, Bendick & Egan Economic Consultants, Inc.) ("[W]e must not for a moment underestimate the role of continuing pervasive blunt discrimination by the private market. . . . The same prime contractor who will use a minority subcontractor on a city contract and will be terribly satisfied with the firm's performance, will simply not use that minority subcontractor on a private contract where the

prime contractor is not forced to use a minority firm."); *The Significance of Croson* at 121-22 (statement of Manuel Rodriguez); *id.* at 104-06 (statement of E.R. Mitchell, Jr., President of E.R. Mitchell Construction Company and President of the Atlanta Chapter of the National Association of Minority Contractors) (identifying racially discriminatory actions by federal and state government agencies in the bidding process on construction contracts).

The government's evidence strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *See, e.g., The Significance of Croson* at 107 (statement of E.R. Mitchell, Jr.) ("[Q]ualified black firms are outside the business network of established white firms. By virtue of being outsiders to their communications loop, it is impossible to successfully bid because we remain forever strangers to white owners and developers."); *The Compelling Interest*, 61 Fed. Reg. at 26,059-60 & nn.107, 109-110 (citing studies and articles on statistical and anecdotal evidence demonstrating discriminatory treatment in the bidding process).

Minority subcontracting enterprises in the construction industry find themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presents evidence both that bonding is an essential requirement of participation in federal subcontracting procurement, *see The Compelling Interest*, 61 Fed. Reg. at 26,060 (citing 40 U.S.C.

§§ 270a-270e), and a "vicious circle" whereby minority subcontractors cannot obtain bonding due to lack of experience, and "since they cannot get bonding, they cannot get experience," *The Compelling Interest*, 61 Fed. Reg. at 26,060 (footnote omitted). *Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 99th Cong., 1st Sess. 159 (1985) (statement of Sherman Brown, President, MCAP, Inc.) ("Virtually everyone connected with the minority contracting industry . . . apparently agrees that surety bonding is one of the biggest obstacles in the development of minority firms."). The government additionally presents evidence of an insular "old-boy" network in bonding that excludes minority firms. *See, e.g.*, H.R. Rep. No. 103-870 at 15 & n.36. There is also strong evidence of overt racial discrimination in the bonding market. *See, e.g., Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enter., Fin. & Urb. Dev. of the House Comm. on Small Bus.*, 103d Cong. 2 (1993) (statement of John B. Cruz, III, President, John B. Cruz Construction Co.) (describing racial discrimination his company suffered in its efforts to obtain bonding); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urb. & Minority-Owned Bus. Dev. of the Senate Comm. on Small Bus.*, 101st Cong. 40-41, 43 (1990) (statement of Andrew Brimmer, President, Brimmer and Company, Inc., Economic and Financial Consultants) (presenting the results of a study showing discrimination in bonding faced by African-American, Hispanic, and Pacific-Islander-owned firms in the Atlanta area); *id.* at 165-66 (statement of

Edward W. Bowen, Project Administrator, Prentiss Properties, Ltd.) (noting that unclear bonding standards permit denials of bonding that are arbitrary and capricious and racially-biased); *Disadvantaged Business Set-Asides in Transportation Construction Projects, supra*, at 107 (statement of Marjorie L. Herter, National President, Women Construction Owners & Executives, USA; President, Vee See Construction Co.) ("Discrimination against women and minorities in the bonding market is quite prevalent."); *The Compelling Interest*, 61 Fed. Reg. at 26060 & n.118 (citing studies of statistical and anecdotal evidence of widespread racial discrimination in bonding). For example, the government cites a Louisiana study according to which "minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for over $1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level," *The Compelling Interest*, 61 Fed. Reg. at 26,060 & n.119 (citing D.J. Miller & Associates, 2 *State of Louisiana Disparity Study* at 35-57 (1991)), while an Atlanta study found similarly glaring disparities in the ability of minority versus non-minority construction firms to obtain bonding generally and "unlimited bonding" in particular, Andrew F. Brimmer & Ray Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia* at 19-20 (1990) (cited in *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urb. & Minority-owned Bus. Dev. of the Sen. Comm. on Small Bus.*, 101st Cong. 193-94 (1990)).

Finally, the government presents evidence of discrimination by suppliers, the result of which is that

nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 26,061; *see also id.* at n.123 (citing studies detailing discrimination by suppliers); *The Significance of Croson* at 106 (statement of E.R. Mitchell, Jr.) ("[C]ommon suppliers working on projects routinely give white subs better prices for materials than they do black subs.").

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the government's evidence as to the kinds of obstacles minority subcontracting businesses face constitutes a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." (Appellee's Br. at 28.)

c. Local Disparity Studies

Following the Supreme Court's decision in *Croson*, numerous state and local governments have undertaken statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *See The Compelling Interest*, 61 Fed. Reg. at 26,061-62 (presenting the Urban Institute's analysis of thirty-nine disparity studies); *see also* 144 Cong. Rec. S5413-14 (May 22, 1998) (statement of Senator Chafee) (discussing a disparity study conducted for CDOT that found "a disproportionately small number

of . . . minority-owned contractors participating in Colorado's transportation construction industry. . . . Hispanic firms received less than one-half of one percent (.26%). . . . The vast majority of contracts – more than 99 percent – went to firms owned by white men."). The government's review of those studies reveals that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest*, 61 Fed. Reg. at 26,062. In that regard, the Croson majority stated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted). We are certainly mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501-02. But here, we are unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. At a minimum, the disparity indicates that there has been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before us that those minority subcontractors who *have* been utilized have

performed inadequately or otherwise demonstrated a lack of necessary qualifications.

The disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity. In *Concrete Works*, we stated that "[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely . . . on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion," and we do not see *Adarand III* as requiring any different standard in the case of an analogous suit against the federal government. 36 F.3d at 1528.[14] Although the

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[14] We reject the decidedly vague urgings of Adarand's amici curiae to reject disparity studies generally as biased and/or insufficiently reliable. Certainly, the conclusions of virtually all social scientific studies may be cast into question by criticism of their choice of assumptions and methodologies. The very need to make assumptions and to select data sets and relevant variables precludes perfection in empirical social science. However, general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and neither compels us to discount the disparity evidence presented in the government's appendix nor does it create "a legitimate factual dispute about the accuracy of [the government's] data." *Concrete Works*, 36 F.3d at 1528 (refusing to grant summary judgment because of a legitimate factual dispute about the accuracy of disparity study data). Moreover, a generalized assertion that disparity studies lack reliability is in conflict with *Croson*, which suggests that disparity studies are entirely relevant to an assessment of whether sufficiently strong evidence exists to support a compelling interest in a race-conscious remedy. *See* 488 U.S. at

government's aggregate figure of a 13% disparity between minority enterprise availability and utilization is

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501; *Concrete Works*, 36 F.3d at 1528 ("[O]nce credible information about the size or capacity of the firms is introduced in the record, it becomes a factor that the court should consider."). Adarand and its amici curiae misinterpret the case law they cite for the proposition that disparity studies are invalid. For example, with regard to *Coral Construction Co. v. King City*, 941 F.2d 910, 921 (9th Cir. 1991), we agree with the Ninth Circuit that the challengers of a DBE program should have the opportunity to rebut statistical evidence. In the present case, Adarand has had such an opportunity both in the district court below, *see Adarand IV*, 965 F. Supp. at 1573-77, and before this Court on appeal, but has failed to present a rebuttal other than an unfocused attack on disparity studies generally. Relying on *Coral Construction Co.*, Adarand's amici further argue the disparity studies were not introduced into evidence and not rebutted; however, the amici do not, and presumably cannot, cite the portion of the record where Adarand objected on that ground to the introduction of the studies via *The Compelling Interest*, 61 Fed. Reg. 26,050, and their objection has been waived. *See Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1502 (10th Cir. 1994) (holding that where the appellant did not show, and the court of appeals could not find, where the issue was raised in the trial court below, the issue was not properly before the court of appeals and would not be considered); *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (holding that as a general rule, the court of appeals will not consider an issue that was not raised below). As for *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1416 (9th Cir. 1991), the court in that case held the statistical evidence presented was sufficient on the facts to establish compelling interest. *Contractors Association of Eastern Pennsylvania*, 6 F.3d at 1005, stated that "[d]isparity indices are highly probative evidence of discrimination." On further appeal in that case, the Third Circuit stated that whether disparity studies provided the requisite strong basis in evidence for upholding the race-

not overwhelming evidence, it is significant. It is made more significant yet by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. Of course, it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[15]

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conscious program at issue was a "close call" but did not decide the question. *Contractors Ass'n of E. Penn., Inc. v. City of Philadelphia*, 91 F.3d 586, 605 (3d Cir. 1996). Finally, *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 903-05, 924 (11th Cir. 1997), can be distinguished on the grounds that the court of appeals affirmed the district court's factual findings which rejected evidence from disparity studies under the deferential "clear error" standard of review. Here the district court committed no clear error in its finding of compelling interest based on the statistical evidence before it. To the extent the foregoing cases may be otherwise interpreted, we reject their holdings.

[15] Based on a comprehensive review of 1987 census data showing disproportionately low minority business ownership and receipts for minority-owned business, the U.S. Commission on Minority Business Development concluded that "minorities are not underrepresented in business because of choice or chance. Discrimination and benign neglect is the reason why our economy has been denied access to this vital resource." United States Commission on Minority Business Development, *Final Report* 60 (1992).

d. Results of Removing Affirmative Action Programs

We take notice of an additional source of evidence of the link between compelling interest and remedy. There is ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *See, e.g.*, 144 Cong. Rec. S1421 (March 5, 1998) (statement of Sen. Moseley-Braun) (citing statistics); *The Compelling Interest*, 61 Fed. Reg. 26,062 & nn.130-134 (citing studies). Although that evidence standing alone is not dispositive, it strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Croson*, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, we conclude that the government has met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

4. Adarand's Rebuttal

Adarand and the amici curiae supporting it have utterly failed to meet their "ultimate burden" of introducing credible, particularized evidence to rebut the government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market.[16] *Concrete Works*, 36 F.3d at 1522 (quoting *Wygant*, 476 U.S. at 277). Its assertions as to the general impermissibility of a race-conscious remedy regardless of the compelling interest identified by Congress are not in accordance with equal protection jurisprudence. It is simply an untenable interpretation of Equal Protection Doctrine to insist that the Constitution requires Congress to acquiesce in the workings of an ostensibly free market that would direct the profits to be gleaned from disbursements of public funds to nonminorities alone. *See Concrete Works*, 36 F.3d at 1519 ("[T]he Fourteenth Amendment permits race-conscious programs that seek . . . to prevent the public entity from acting as a ' "passive participant" in a system of racial exclusion . . . ' by allowing tax dollars 'to finance the evil of private prejudice.' " (quoting *Croson*, 488 U.S. at 492));

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[16] We disagree with Adarand's contention that the government's "Appendix I" to its motion for summary judgment (Appellants' App. at 44-53) is insufficient evidence of Congress's findings. The Appendix references and discusses the long and comprehensive legislative history and findings on discrimination in the nationwide construction contracting market. Adarand's challenge to that history is too conclusory to meet its burden under *Concrete Works*.

see also Adarand III, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

We reject Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination.[17] The evidence cited by the government and its amici curiae and examined in this opinion only reinforces the conclusion that "racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets." *The Compelling Interest*, 62 Fed. Reg. at 26,062. In *Concrete Works*, 36 F.3d at 1530-31, the plaintiff "specifically identified" and "put forth evidence" showing "flaws" in the data justifying the

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[17] *Adarand III* called into question *Fullilove's* standard of review and possibly its result. However, as far as we can ascertain, nothing in *Adarand III* undermines the conclusion of the lead *Fullilove* opinion that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-78 (Op. of Burger, C.J.); *see also Croson*, 488 U.S. at 504 ("[In the *Fullilove* case,] Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. . . . Congress has made national findings that there has been societal discrimination in a host of fields.").

City of Denver's affirmative action program, thus precluding summary judgment on the issue of compelling interest. Here, by contrast, the government's evidence permits a finding that as a matter of law Congress has the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. This evidence demonstrates that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises – both discussed above – are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. Furthermore, Congress is not limited to simply proscribing federal discrimination against minority contractors, as it has obviously already done. The Constitution does not obligate Congress to stand by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice.[18]

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[18] We likewise reject Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. If Congress has valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. "Race" is often a classification of dubious validity – scientifically, legally, and morally. We need not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637(d)(3)(C).

The evidence at issue is not, as Adarand would have it, merely evidence of generalized societal discrimination. *See Wygant*, 476 U.S. at 276 (Op. of Powell, J.) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). Rather, it is evidence of specific barriers to market entry and fair competition facing actual and potential minority participants in the market for public construction contracts. In short, the construction contracting market is overwhelmingly composed of non-minorities due to the effects of racial discrimination.

We do not intend to suggest that the evidence cited by the government is unrebuttable. We merely point out that under our precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. We reiterate that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277-78 (plurality)). "[T]he non-minority [challengers] . . . continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring)). Because Adarand has failed utterly to meet its burden, the government's initial showing stands.

In sum, guided by *Concrete Works*, we conclude that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed. Reg. 26,050, more than satisfies the government's burden of production regarding the compelling interest for a race-conscious remedy. Congress has a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. We therefore affirm the district court's finding of a compelling interest.

C. Narrow Tailoring

We turn now to the question of narrow tailoring. Here, again, we must first define "narrow tailoring" for purposes of strict scrutiny and then determine whether the SCC program in the present case falls within that definition.

1. "Narrow Tailoring" in Race-conscious Programs Defined

We are guided in our inquiry by the handful of Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

> [i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted). Regarding flexibility, "the availability of waiver" is of particular importance. *Id.* As for numerical proportionality, *Croson* admonishes us to beware of the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a "rigid numerical quota" particularly disserves the cause of narrow tailoring. *Id.* at 508.[19] Finally, as for burdens imposed on third parties, a plurality of the Court in *Wygant* stated:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the

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[19] While *Paradise* only assumed without deciding that strict scrutiny is the appropriate standard, *see* 480 U.S. at 166-67 (plurality), it nevertheless applied strict scrutiny to affirm a race-conscious relief measure, *see id.* at 185-86. Although the *Paradise* factors require some modification in order to be used for evaluating the nationwide legislative enactment and its implementing regulations and programs at issue here (as opposed to a judicial order aimed at a particular police department), they provide some general guidance on questions the Court considers relevant to the narrow tailoring inquiry. *See also Adarand III*, 515 U.S. at 237 (citing the opinions of Justices Brennan, Stevens, and O'Connor in *Paradise* "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' " (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring))).

> remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

476 U.S. at 280-81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Justice O'Connor's majority opinion in *Croson* adds a further factor to our analysis: under- or over-inclusiveness of the DBE classification. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination. . . . [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at 508 (citation omitted). Thus, we must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad – or too narrow – a brush.

More specific guidance is found in *Adarand III*. In remanding for strict scrutiny, the Court identified two questions apparently of particular importance in the instant case: (1) "[c]onsideration of the use of race-neutral means;" and (2) "whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate." *Adarand III*, 515 U.S. at 237-38 (internal quotations and citations omitted). We

thus direct our attention to an analysis of the program in light of *Adarand III*'s specific questions on remand, and the foregoing narrow-tailoring factors, in the following order: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness.

2. Race-neutral Alternative Remedies

The first factor to be considered is that of the availability of alternative remedies to the race-conscious measures at issue. The district court in *Adarand IV* found, and Adarand does not challenge its finding, that Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy. *See Adarand IV*, 965 F. Supp. at 1582-83; *see also Croson*, 488 U.S. at 507 (noting the finding in *Fullilove* that "Congress . . . carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside").[20] That finding

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[20] Although the standard of review and result of *Fullilove* have been called into question by *Adarand III*, the district court noted, in our view correctly, that a square majority of the Court in *Croson* cited with approval the principal opinion in *Fullilove* for this factual finding. We fail to see how this factual aspect of *Fullilove* has been impaired; Adarand offers no authority to refute the finding that three decades of race-neutral measures failed to have any appreciable effect on the exclusion of minorities from the receipt of government highway largesse.

is law of the case and is not clearly erroneous. *See Agostini*, 521 U.S. at 236; *McIlravy*, 204 F.3d at 1034-35. The long history of discrimination in, and affecting, the public construction procurement market – despite the efforts dating back at least to the enactment in 1958 of the SBA to employ race-neutral measures – places a formidable burden on both existing and would-be minority participants and thus justifies race-conscious action to address a decidedly racial disparity.

A separate question, however, is whether the FLHP considered other more narrowly tailored measures before deciding to implement 15 U.S.C. § 644(g) by means of the SCC, with its race-based presumptions of disadvantage. The government's argument focuses on *Congress's* consideration of race-neutral measures prior to enacting its policy of maximizing opportunity for minority-owned and controlled businesses and setting aspirational goals for the participation of such businesses in federal contracting. Although *Congress* considered the futility of race-neutral measures prior to incorporating the aspirational goals into the SBA and the relevant appropriations measures, the government fails to address whether the *FLHP* considered either measures short of a race-conscious subsidy to prime contractors or a more refined means of assessing subcontractors' eligibility for race-conscious programs prior to promulgating the regulations implementing the SCC. The record persuades us

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Adarand offers no evidence to rebut the district court's conclusion that Congress entertained and indeed attempted years of race-neutral measures without success before resorting to the programs at issue in this lawsuit.

that under the high degree of solicitude for individual rather than race-based consideration mandated by the Court's strict scrutiny standard, the government has not shown that the FLHP adequately considered such alternative measures in the 1996 SCC program.

Again, the situation has since changed dramatically.[21] A comparison of that previous SCC program with the new federal regulations under TEA-21 is particularly instructive. The current, revised regulations instruct recipients that "[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation," 49 C.F.R. § 26.51(a) (2000); *see also* 49 C.F.R. § 26.51(f) (2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, *see* 49 C.F.R. § 26.51(b) (2000). The current regulations also outline several race-neutral means available to program recipients including helping overcome bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See* 49 C.F.R. § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. The record before us does not indicate whether or not

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[21] The regulatory changes discussed below resulted from several years of study and consideration of *Croson* and *Adarand III*. *See* 64 Fed. Reg. 5096, 5101-03 (1999) (discussing how regulatory changes address the requirements of narrow tailoring).

FLHP considered race-neutral measures prior to resorting to the SCC. This absence weighs strongly against any finding of narrow tailoring. *See Adarand III*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507. The district court was therefore correct, given the information before it at the time, that the SCC program was not narrowly tailored, and should the government reinstitute the revised program without considering race-neutral measures similar to those outlined in 49 C.F.R. § 25.51(a) and (b) (2000), that program too would be insufficiently narrowly tailored.

3. Appropriate Limit on Duration

A second important factor in any narrow-tailoring analysis is a limit on the duration of the race-conscious measures at issue. The district court declined to address this aspect of the Supreme Court's inquiry on remand because of the court's finding that the 1996 SCC program was not narrowly tailored for other reasons. *See Adarand IV*, 965 F. Supp. at 1584. Although we agree for different reasons that the 1996 program the district court considered was insufficiently narrowly tailored to pass constitutional muster, the factor of limited duration is mentioned in *Adarand III*, 515 U.S. at 238, and we accept the Court's invitation to consider this factor now.

The duration of a particular company's DBE status is limited by statute and regulation to approximately ten-and-one-half years under the § 8(a) certification program. *See* 15 U.S.C. §§ 634(b)(6), 636(j)(10)(C)(i), 637(a), (d); 13 C.F.R. § 124.110 (1996); 13 C.F.R. § 124.2 (2000). Moreover, each participant in the § 8(a) program is required to

annually submit financial and other information, on the basis of which the SBA reevaluates and may "graduate" a small disadvantaged business from the program as no longer qualified (e.g., because the criteria of economic disadvantage are no longer met). *See* 15 U.S.C. §§ 636(j)(10)(G), 637(a)(6)(B), (C). The § 8(a) program's inherent time limit and graduation provisions ensure that it, like the program upheld in *Paradise*, is carefully designed to "endure[ ] only until . . . the discriminatory impact" has been eliminated; once a DBE loses its economic disadvantage, it loses its certification. *Paradise*, 480 U.S. at 178. As far as we can ascertain from the regulations previously in effect, the § 8(d) program did not have an analogous individual time limit. Therefore, insofar as the 1996 SCC program relied on § 8(a) criteria, those criteria increased the narrow tailoring of the program. However, insofar as the program relied on § 8(d) criteria, through state certifications,[22] we discern no evidence that the specific criteria of DBE eligibility provide a temporal limit to the program. Thus, insofar as the district court suggested that an SCC program based on § 8(a) criteria would be insufficiently narrowly tailored, we disagree; the court's skepticism about the fatality in fact of strict scrutiny in the narrow-tailoring context is contrary to the Supreme Court's own pronouncements in both *Adarand III*, 515 U.S. at 237, and *Croson*, 488 U.S. at 509.

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[22] Notably, Gonzalez was certified through such a state program in the present case, belying the government's argument that there was no evidence of unconstitutional state certifications under the version of § 8(d) in place at the time this litigation commenced.

In this respect, too, we note that the government has modified its unconstitutional practices. The current § 8(d) program regulations specifically incorporate the certification requirements from the Small Business Administration regulations implementing the § 8(a) program. *See* 48 C.F.R. § 19.001 (2000) (incorporating certification requirements of 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt. A). The regulations incorporated into the § 8(d) program provide for a certification of a business as socially and economically disadvantaged for three years after either the initial certification or other administrative determination. *See* 13 C.F.R. § 124.1014 (2000). If a business wishes to remain certified for longer than three years, it must "submit a new application and receive a new certification." *Id.* § 124.1014(c).[23] Therefore, with regard to appropriate limitations on duration, the current DBE certification programs are narrowly tailored.

Finally, we note that Congress extensively debated whether to renew the DBE program prior to passing TEA-21 in 1998. *See, e.g.*, 144 Cong. Rec. S1481-06, S1481-96 (March 6, 1998); *id.* S1395-01, S1395-434 (March 5, 1998); *id.* H1885-04, H2000-11 (Apr. 1, 1998). These debates, in addition to the limited duration of th DBE

[23] Although the § 8(a) program provides for annual rather than tri-annual review of DBE certification, for purposes of the "duration" prong of the narrow-tailoring inquiry, that difference is not so glaring as to require striking down the § 8(d) program; rather, it is the periodic reevaluation of disadvantaged status that renders this aspect of the program narrowly tailored because in that way, the program will not last longer than the situation it seeks to correct.

program in accordance with the limited duration of TEA-21 and other highway appropriations statutes like it, indicate that the race-conscious programs at issue are "appropriately limited" to last no longer than "the discriminatory effects [they are] designed to eliminate." *Adarand III*, 515 U.S. at 238 (quotation omitted).

4. Additional Narrow-Tailoring Factors

Although they were not emphasized by the *Adarand III* Court, we deem the other factors discussed in *Paradise*, 480 U.S. at 171, and *Croson*, 488 U.S. at 507-08, to be of value in the narrow tailoring analysis, and we turn to them now.

a. Flexibility

The 1996 SCC program, providing a subsidy for the use of DBEs, is certainly more flexible than the set-asides considered in either *Fullilove* or *Croson* because the program is not mandatory. It does not require the use of DBEs in subcontracting against the will of the prime contractor. *See Adarand IV*, 965 F. Supp. at 1583 (finding that the prime contractor's choice to avail itself of the SCC is "more flexible than the 'rigid racial quota' struck down in *Croson*, 488 U.S. at 499, and the 10 percent set aside upheld in *Fullilove*, 448 U.S. at 513-14").[24] Moreover,

[24] None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. § 637(d)(4), pertains to the SCC. However, even if § 8(d)(4) were relevant here, that would not change our conclusion that the SCC is not mandatory in nature. Section

the 1996 SCC program incorporates an additional element of flexibility – "the availability of waiver," *Paradise*, 480 U.S. at 171 – because any prime contractor is free not to take advantage of the clause and will never be required to make a "gratuitous" choice of subcontractors, *id.* at 178. With regard to flexibility, the 1996 program passes muster under a narrow-tailoring analysis.

Nothing has changed in this regard from 1996 until the present that would militate the contrary conclusion. On the contrary, the present version of the regulations have increased the flexibility of the government's DBE programs: An express waiver provision has been added to the current regulations. *See* 49 C.F.R. § 26.15 (2000) (allowing recipients of federal highway construction funds to seek waivers and exemptions, despite the already non-mandatory nature of DBE programs).

8(d)(4)(E) informs government agencies letting contracts that they are "*authorized* to provide such incentives as such Federal agency *may deem appropriate* in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract." 15 U.S.C. § 637(d)(4)(E) (emphasis added). This language demonstrates that § 8(d)(4) merely authorizes, but does not require, the use of incentives (of whatever type) to further the aspirational goals of increased participation in government contracts by socially and economically disadvantaged individuals. The fact that the FLHP has discontinued use of the SCC further demonstrates that § 8(d)(4) in no way requires an incentive clause in federal highway transportation contracts.

b. Numerical Proportionality

The essential question arising out of the numerical proportionality factor of *Paradise* is whether the aspirational goals of 5% in the SBA and 10% participation contained in STURAA, ISTEA, and TEA-21 are proportionate only if they correspond to an actual finding as to the number of existing minority-owned businesses. Despite involving a rigid quota rather than flexible and periodically adjusted aspirational goals, *Croson* may be read to suggest as much. *See Croson*, 488 U.S. at 507 (characterizing as "completely unrealistic" the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population" (citing *Sheet Metal Workers*, 478 U.S. 421 at 494 (O'Connor, J., concurring in part and dissenting in part))). However, because Congress has evidence that the effects of past discrimination have excluded minorities from the construction industry and that the number of available minority subcontractors reflects that discrimination, the *existing* percentage of minority-owned businesses is not necessarily an absolute cap on the percentage that a remedial program might legitimately seek to achieve. Absolute proportionality to overall demographics is an unreasonable goal. However, *Croson* does not prohibit setting an aspirational goal above the current percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole. This aspirational goal is reasonably construed as narrowly tailored to remedy past discrimination that has resulted in homogenous ownership within the industry. It is reasonable to conclude that

allocating more than 95% of all federal contracts to enterprises owned by non-minority persons, or more than 90% of federal transportation contracts to enterprises owned by non-minority males, is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid. *See Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

Apart from the reasonableness of the goals, the record before us supports the government's contention that the 5% and 10% goals incorporated in the statutes at issue here, unlike the set-asides in both *Fullilove* and *Croson*, are merely aspirational and not mandatory. *Cf. Croson*, 488 U.S. at 508 (finding no need "for a rigid numerical quota"). Therefore, while the goal may well be relevant to the numerical proportionality aspect of the *Paradise* strict scrutiny inquiry, we disagree with the district court that the goal itself is facially unconstitutional. Moreover, there is simply no showing that Adarand lost or will lose contracts due to the STURAA/ISTEA/TEA-21 10% goals for DBE participation, but rather only due to the over- or under-inclusive race-based presumptions involved in certification for 1996 SCC eligibility. Therefore, we conclude both that Adarand is without standing to mount any independent challenge to the 5% and 10% figures and that such a challenge is outside the scope of the Supreme Court's *Adarand III* remand. *See Adarand IV*, 965 F. Supp. at 1566 n.11 (noting that "Defendants maintain, and Adarand does not dispute, that the challenge in this action is based only on the use of the SCC to meet the various goals" established by the SBA, STURAA, and ISTEA).

We also conclude the government failed to carry its evidentiary burden in the district court insofar as the use of the 1996 SCC was based on an ill-defined 12-15% goal apparently adopted by the Federal Highway Administration ("FHA"). (*See* Appellants' App. at 187.) Unlike the congressionally-mandated goals that are supported by legislative history and supplemental evidence, we can find no explanation in the record before us of the basis in evidence on which the FHA relied in adopting this 12-15% goal (if in fact there is one). That congressional findings support the 5% and 10% aspirational goals in the SBA and transportation appropriation statutes, respectively, as well as the delegation of responsibility for setting individual goals to various agencies, does not vitiate the constitutional duty of those agencies to assure that the goals are supported by evidence that meets the requirements of *Croson* and *Concrete Works*. The complete absence of an explanation for the 12-15% goal in the record would have required granting summary judgment in favor of Adarand on the question of whether use of the 1996 SCC is narrowly tailored to meet the compelling interest determined by Congress.

Once again, however, comparison of the 1996 SCC to the current TEA-21 regulations is instructive and leads us to the conclusion that the recent regulatory changes preclude ruling in favor of Adarand at the present time for reasons beyond the abandonment of use of the SCC in federal highway construction contracting. The process by which recipients of federal transportation funding set aspirational goals is now much more rigorous. The current regulation instructs each recipient that its "overall goal must be based on demonstrable evidence of the

availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts" and must make "reference to the relative availability of DBEs in [the recipient's] market." 49 C.F.R. § 26.45(b) (2000). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." *Id.* § 26.45(c). Such evidence may include census data and valid disparity studies. *See id.* § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goal by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. *See id.* § 26.45(d). When submitting a goal, the recipient must include a description of the methodology and evidence used. *See id.* § 26.45(f)(3). Significantly, the rigidity of even those realistic goals is negligible. Once the goals have been set, there is no requirement that the recipient actually meet them, merely that it make a good faith effort to do so: So long as good faith efforts were made, failure to meet a goal will not subject a recipient to penalties or to being held in noncompliance. *See id.* § 26.47(a). These new requirements that federal agencies rigorously examine, in a verifiable manner, the reasonableness of DBE programs given particular local conditions further ensure that government agencies will heed *Croson*'s mandate to avoid rigid application of DBE percentages in government contracting. *See* 488 U.S. at 507.

In sum, in conformity with the aspirational nature of the percentage goals of the relevant statutes, the current regulations emphasize that the 10% figure is nothing more than "an aspirational goal at the national level," 49

C.F.R. § 26.41(b) (2000), which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level," *id.* § 26.41(c). Thus, in practice there are significant requirements currently in place that must be met by any recipient of federal highway construction funds before setting even an aspirational goal for DBE participation. There is little danger of arbitrariness in the setting of such goals, as was the case in *Croson*, 488 U.S. at 507.

c. Burden on Third Parties

As for the third *Paradise* factor, the burden on third parties is obviously significant enough to grant standing to Adarand. *See Adarand III*, 515 U.S. at 211-12. While there appears to be no serious burden on prime contractors, who are obviously compensated for any additional burden occasioned by the employment of DBE subcontractors, at the margin, some non-DBE subcontractors such as Adarand will be deprived of business opportunities. *See Wygant*, 476 U.S. at 280-81 (Op. of Powell, J.) ("When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, . . . a 'sharing of the burden' by innocent parties is not impermissible." (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted)). Insofar as the 1996 and current SCC programs are "limited in scope and duration, [they] only postpone[ ]" the hiring of non-DBEs, "impos[ing] a diffuse burden . . . foreclosing only one of several opportunities." *Paradise*, 480 U.S. at 183 (quoting *Wygant*, 476 U.S. at 283).

These further limitations have been incorporated: (1) Compensation under the SCC above 1.5-2% of the total contract is prohibited (*see* Appellants' App. at 56); (2) under the revised SCC, there is also a monetary limit to compensation under the program of $50,000-$100,000 (*see* Appellants' Supp. Br. Attach. 2 at 3). Thus, the subsidy is capped in such a way as to circumscribe the financial incentive to hire DBEs; after a fairly low threshold, the incentive for the prime contractor to hire further DBEs disappears.

Moreover, the current regulations are designed to increase the participation of non-minority DBEs. As to those not falling into one of the categories to which a presumption of social disadvantage applies, the current regulations retain procedures for non-minorities to participate in the DBE program. Consistent with the changes in SBA regulations, proof of social disadvantage by those not so presumed may be shown by a preponderance of the evidence, rather than by the former "clear and convincing" standard. *Compare* 49 C.F.R. §§ 26.61(d), 26.67(d) (2000) and 13 C.F.R. § 124.105(c)(1) (2000) *with* 13 C.F.R. § 124.105(c)(1) (1996). The current regulations also require recipients to ensure that DBEs are not "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate." 49 C.F.R. § 26.33(a) (2000).

While at the margin, some DBEs may be hired under the program in lieu of non-DBEs, the possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. To invalidate the

1996 and revised SCC and other government DBE programs on that basis would be to render strict scrutiny effectively fatal, in contravention of Justice O'Connor's clear statements to the contrary. *See Adarand III*, 515 U.S. at 237.

d. Over- or Under-Inclusiveness

The last factor we must consider in applying strict scrutiny in this case is that of the over- or under-inclusiveness of the programs at issue. One factor in the *Croson* Court's rejection of the Richmond Plan was the lack of "inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination." *Croson*, 488 U.S. at 508.

Even if a race-conscious *means* of achieving the goal of increasing minority participation is necessary, in promulgating the SCC in use at the time of the district court's decision in *Adarand IV*, defendants-appellants have not demonstrated that they considered the effectiveness of at least one other, less sweeping approach to implementing a race-conscious SCC program: disaggregating the presumptions of social and economic disadvantage, as is the case under the SBA § 8(a) program, to require a separate determination of social disadvantage and economic disadvantage. *See* 48 C.F.R. § 52.219-8 (1996). Requiring a separate showing as to each type of disadvantage would help address the Court's concern in *Croson* that a government entity undertake the necessary administrative effort "to tailor remedial relief to those who truly have suffered from the effects of prior discrimination." 488 U.S. at 508. The record does not disclose any

evidence that defendants undertook, and found to be unsuccessful, a program incorporating, as under § 8(a), a more individualized inquiry as to economic disadvantage prior to implementing the particular SCC program at issue in this litigation.

If the § 8(d) program in place prior to 1999 is interpreted, as we conclude it must be, to accord a presumption of economic as well as social disadvantage to minority individuals under § 8(d), while not doing so under § 8(a), that fact suggests that another more carefully tailored approach is available, i.e., the § 8(a) approach of individualized inquiry into economic disadvantage. The final section of *Adarand III*, 515 U.S. at 238-39, suggests the distinction is relevant. If individualized inquiry into economic disadvantage is sufficient to serve the purpose, why then dispense with such inquiry under § 8(d)? Indeed, if one can qualify under § 8(d), what is the significance of permitting qualification under § 8(a), aside from the practical matter of already including those DBEs enjoying § 8(a) benefits?

At the time *Adarand IV* originally was appealed in 1997, the government argued that the more lenient approach of § 8(d) is acceptable because of the differing purposes of § 8(a) and § 8(d).

> The [§] 8(a) program is targeted towards a smaller number of firms and provides direct assistance and protection from open competition over a period of years to help such firms become viable as prime contractors. By contrast, the [§] 8(d) program is focused on opening up federal subcontracting opportunities to a much larger

> number of small disadvantaged firms, and thus imposes less restrictive qualifications.

(Appellants' Br. at 34 (citing 13 C.F.R. § 124.06(b) (1997)).) That distinction, however, fails to identify why an individualized inquiry into economic disadvantage, which is admittedly practicable for § 8(a) purposes, was unnecessary for the particular purposes of § 8(d) prior to 1999. To put it simply, presuming economic disadvantage based on membership in certain racial groups does make § 8(d) "less restrictive," but it is not thereby narrowly tailored. The government fails to explain why it could not have used a non-race-based means of making § 8(d) "less restrictive." Therefore, we must conclude, under *Croson*, that the § 8(d) method of certification reviewed by the district court in *Adarand IV* is not narrowly tailored insofar as it obviates an individualized inquiry into economic disadvantage. *See Croson*, 488 U.S. at 508 (rejecting an affirmative action program in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination . . . [, and] the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification" (citation omitted)).

Requiring state certification standards to incorporate an individualized inquiry into economic disadvantage would certainly increase the burden on enterprises seeking DBE certification, as the government argues, and therefore would presumably reduce the pool of eligible enterprises. That increased burden, however, is slight when compared with the constitutional imperative to

avoid over- or under-inclusive racial classifications – the "Sultan of Brunei" scenario that troubled the district court, *Adarand IV*, 965 F. Supp. at 1581 n.17 ___, and the § 8(d) certification process thus fails to satisfy the narrow tailoring prong of the strict scrutiny inquiry. *Cf. Croson*, 488 U.S. at 508. When faced with the readily available alternative approach under § 8(a) of requiring would-be DBEs to provide a narrative statement of the economic disadvantage they have faced, combined with the various other more narrowly tailored alternatives discussed above, we fail to see how the SCC approach to certification in use at the time of *Adarand IV* satisfies the rigorous narrow tailoring requirement of the strict scrutiny calculus. In short, by inquiring into economic disadvantage on an individual basis, the program could avoid improperly increasing the contracting opportunities of those minority entrepreneurs whose access to credit, suppliers, and industry networks is already sufficient to obviate the effects of discrimination, past and present.

Yet again, the government has eliminated its offending 1996 practices. In particular, it has eliminated the discrepancy between the individualized determination of economic disadvantage characterizing the § 8(a) program and the non-individualized presumption of economic disadvantage characterizing the § 8(d) program. *See* 48 C.F.R. § 19.001 (2000) (providing that the § 8(d) program regulations expressly incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt.

A); *see also* 48 C.F.R. § 19.703 (2000) (eliminating the race-based presumption of economic disadvantage of the former regulation); *id.* § 52.219-8. The current regulations also impose a new requirement on applicants with regard to an individualized showing: They must submit a narrative statement describing the circumstances of that purported economic disadvantage. *See* 13 C.F.R. § 124.104(b)(1) (2000); *see also* 49 C.F.R. § 26.67(b)(1) (2000) (providing a net worth limit for DBEs under ISTEA and TEA-21); *id.* § 26.65(b) (stating that businesses exceeding a certain amount of gross receipts are ineligible for the DBE program). With the individualized determination of § 8(a) extended to economic disadvantage under § 8(d), the main obstacle to a finding of narrow tailoring has disappeared.

Thus, one of *Adarand III*'s "unresolved questions" has been answered, namely, whether the § 8(d) DBE certification program requires an individualized showing of economic disadvantage or whether the presumption applies to both social and economic disadvantage. *Adarand III*, 515 U.S. at 238. The 1996 § 8(d) certification program did not require an individualized showing of economic disadvantage, whereas the current § 8(d) certification program does require such an individualized showing.

There remains a further question of over- and under-inclusiveness that we must consider. The district court, *Adarand IV*, 965 F. Supp. at 1580, found that the 1996 SCC program was not narrowly tailored in part due to a failure to inquire into discrimination against each particular minority racial or ethnic group. The district court's opinion cites Adarand's arguments that "there is no evidence that Aleuts, Samoans or Bhutans [sic] have been

discriminated against in the Colorado construction industry." *Id.* Insofar as the district court held that the scope of the inquiry into the statutes generally was the Colorado construction industry alone, this is at odds with our holdings regarding compelling interest and Congress's power to enact nationwide legislation. Furthermore, as discussed below, because of the unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications, extrapolating findings of discrimination against Native Americans, Asian-Pacific Americans, and Asian-Americans to include Aleuts, Samoans, and Bhutanese, respectively, is more a question of nomenclature than of narrow tailoring. The Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications. While the concept of classifying human beings by race is distasteful, the fact remains that discrimination occurs based on such classifications, and engaging the classifications in order to eradicate such discrimination is a necessary evil which constitutes a compelling government interest.

We agree in principle that the 1996 SCC program would be more narrowly tailored had the CFLHD conducted an inquiry into the scope of discrimination within the region it administers as the current regulations

mandate.[25] However, the district court's ensuing conclusion appears to stem from a premise that a classification, to be narrowly tailored, must not only include minority individuals who have themselves suffered discrimination, but must also automatically include all non-minority individuals who have suffered disadvantage as well. *Cf. Fullilove*, 448 U.S. at 486 ("There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program."). Requiring that degree of precise fit would again render strict scrutiny "fatal in fact." *Id.* at 507 (Powell, J., concurring). We hold that such fatality is inconsistent with *Adarand III*, which re-affirmed *Paradise*, in its declaration that strict scrutiny was not fatal in fact. *See Adarand III*, 515 U.S. at 237. There can be a permissible middle ground in appropriate circumstances between the entirely individualized inquiry of a Title VII lawsuit, for

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[25] Nonetheless, the geographic scope of the remedial powers of a local government, as in *Croson*, and that of Congress's remedial powers under § 5 of the Fourteenth Amendment differ. *See Croson*, 488 U.S. at 488 (Op. of O'Connor, J.). In *Croson*, the City ignored the fact

> that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Id. at 490 (Op. of O'Connor, J.) (citations omitted).

example, and an unconstitutionally sweeping, race-based generalization. Indeed, the police officers receiving the benefit of the promotion policy in *Paradise* were not required to prove that they themselves *individually* were victims of past discrimination.[26]

Although we disagree with the district court's effectively fatal standard of scrutiny, we again note that comparison with the current SBA § 8(d) and TEA-21 regulations illustrates how the more careful tailoring now in place avoids some of the problems identified by the district court – again, the court's conclusion that the "Sultan of Brunei," should he have the temerity to apply, could qualify for DBE status. *Adarand IV*, 965 F.Supp. at 1581 n.17. *See* 13 C.F.R. § 124.104(c)(2) (2000); 48 C.F.R. § 19.001 (2000); 49 C.F.R. §§ 26.65, 26.67(b) (2000) (providing for an individual net worth limit for DBE certification). The current regulations more precisely identify the

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[26] Although the viability of *Fullilove* is uncertain, the *Fullilove* majority rejected a very similar overinclusiveness challenge to the 1977 10% MBE set-aside:

> It is also contended that the MBE program is overinclusive – that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case.

Fullilove, 448 U.S. at 486.

proper minority recipients of DBE certification by periodically re-screening for economic disadvantage all candidates for such certification. *See* 48 C.F.R. § 19.1014 (2000).

Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, we conclude that the 1996 SCC was insufficiently narrowly tailored as applied in this case and is thus unconstitutional under *Adarand III* 's strict standard of scrutiny. Nonetheless, after examining the current SCC and DBE certification programs, we conclude that the 1996 defects have been remedied, and the relevant programs now meet the requirements of narrow tailoring.

D. "Unresolved Question"

As a final matter, inasmuch as *Adarand III* suggests that an additional "unresolved question[ ]" concerning one of "the details of the complex regulatory regimes," 515 U.S. at 238, bears on the constitutionality of the SCC program, we address that question now: namely, whether there are differing definitions of economic disadvantage under § 8(a) and § 8(d). The 1996 regulations establish that § 8(a) certification requires, for determination of economic disadvantage, comparison with "others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.106(a) (1996). Subsection 8(d) certification, however, apparently requires comparison with "others in the same or similar line of business" generally, presumably with all others, socially disadvantaged or not. 13 C.F.R. § 124.106(b) (1996). Because under 1996 programs based on § 8(d) economic disadvantage is

to be presumed for minorities, the § 8(d) comparative analysis would appear to arise only in the event of either a challenge to the presumption in the case of a particular minority DBE, or application for DBE status by a socially-disadvantaged non-minority subcontractor (the classic example being the white subcontractor from rural Appalachia). We are unable to discern the constitutional relevance of these two slightly different methods of comparison.[27] Moreover, the distinction between the two has disappeared in the current version of the regulations. The current regulation retains the more precise definition previously applicable to the § 8(a) program, requiring a comparison of the applicant to those who are not socially disadvantaged. *See* 13 C.F.R. § 124.104(a) (2000); *see also* 48 C.F.R. § 19.001 (2000) (incorporating the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating 13 C.F.R. pt. 124, subpt. A, in determining social and economic disadvantage).

IV

As a final matter, the government argues that we should remand this case in light of a pending, potentially related lawsuit originally filed under the name *Adarand Constructors, Inc. v. Romer*, No. CIV. A. 97-K-1351 (D.

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[27] We reject the contention that two slightly different definitions of economic disadvantage for purposes of two different certification methods create uncertainty as to who is a DBE, thus necessarily precluding any finding of narrow tailoring.

Colo.) (filed June 26, 1997).[28] *Romer* involves a challenge by plaintiff in the instant case to use of race-conscious policies in highway construction projects by CDOT. Adarand has conceded that its challenge in the instant case is to "the federal program, implemented by federal officials," and not to the letting of federally-funded construction contracts by state agencies. (Appellee's Br. at 24 n.23.) We do not have before us a sufficient record to enable us to evaluate the separate question of CDOT's implementation of race-conscious policies. The propriety of potential consolidation of the instant action and *Romer* following our remand is a question to be considered by the district court in the first instance, should that question arise.

V

The judgment of the district court is *REVERSED*. This matter is remanded for further proceedings consistent with this opinion.

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[28] Decisions arising out of the *Romer* litigation include: *Adarand Constructors, Inc. v. Romer*, 174 F.R.D. 100 (D. Colo. 1997) (denying the federal government's motion to intervene); *Adarand Constructors, Inc. v. Romer*, No. 97-1285, 1999 WL 770176 (10th Cir. Sept. 29, 1999) (unpublished) (permitting intervention by the federal government); and *Adarand Constructors, Inc. v. Owens*, No. CIV. A. 97-K-1351, 2000 WL 490690 (D. Colo. Apr. 24, 2000) (unpublished) (dismissing the governor of Colorado as a defendant).

APPENDIX

As noted, several statutes are implicated in this case, notably the Small Business Act of 1958 ("SBA"), Pub. L. No. 85-536, 72 Stat. 384, as amended, 15 U.S.C. §§ 631 *et seq.*, § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132, and § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914, the Transportation Equity Act for the 21st Century of 1998 ("TEA 21"), Pub. L. No. 105-178, 112 Stat. 107, 113, as well as their accompanying administrative regulations. In the discussion that follows, we outline the statutory and regulatory scheme as it was at the time of the first and second district court decisions.[29] Then we discuss the relevant changes in that scheme after 1997.

A. SBA

Subsection 8(d)(1) of the SBA states "[i]t is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1).[30] "Socially disadvantaged

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[29] The relevant language in the statutes and regulations did not change in any material way between *Adarand I* and *Adarand IV*, and therefore references to regulations are to 1991 regulations unless otherwise indicated.

[30] The SCC defines Disadvantaged Business Enterprises ("DBEs") as those concerns owned and operated by socially and economically disadvantaged individuals.

individuals" are defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). The SBA further defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A).[31]

15 U.S.C. § 637(d)(2) requires that all federal contracts, with certain exceptions not relevant here, contain a clause stating it is the government's policy for small disadvantaged businesses to have "the maximum practicable opportunity to participate" as contractors or subcontractors. *See* 15 U.S.C. § 637(d)(3). The required clause includes the following language: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section

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[31] It appears that the 1996 regulations implementing the § 8(d) certification program provide that the showing of disadvantage requires a general comparison "to others in the same or similar line of business." 13 C.F.R. § 124.106(b)(1) (1996). Justice O'Connor suggests that this distinction may have constitutional significance. See *Adarand III*, 515 U.S. at 238.

8(a) of the Small Business Act [15 U.S.C. 637(a)]." 15 U.S.C. § 637(d)(3)(C).[32]

15 U.S.C. § 644(g)(1) provides for a government-wide goal of 5% minimum minority business participation calculated on the basis of "the total value of all prime contract and subcontract awards for each fiscal year."[33]

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[32] 15 U.S.C. § 637(d)(4) provides for certain additional requirements for contracts to be awarded "pursuant to the negotiated method of procurement" and exceeding certain dollar amounts. These requirements include an approved plan providing maximum opportunity for small business concerns, *see id.* § 637(d)(4)(D), and provision for agencies to offer incentives to encourage subcontracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals, *see id.* § 637(d)(4)(E). The parties have not addressed paragraph (4) of § 8(d) at all, and, because there is no indication from the parties that Adarand has or will bid for contracts governed by that paragraph's requirement, we do not address it in great detail.

[33] Section 644(g)(1) provides in relevant part that

> [t]he President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. . . . The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. . . . Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity . . . for small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

The Federal Highway Administration appears to have adopted, pursuant to 15 U.S.C. § 644(g)(2), goals of 12-15% participation for the period of time pertinent to this litigation. (Appellants' App. at 187.) These goals are aspirational rather than mandatory and must "realistically reflect the potential" of small disadvantaged businesses to perform subcontracts. *See* 15 U.S.C. § 644(g)(2), (h)(1). Section 644(h) further mandates annual reports to the Administration and Congress on the results of government agency efforts to increase contracting participation by small businesses, including those owned and controlled by socially and economically disadvantaged individuals.

1. Subsection 8(a)

The § 8(a) program provides numerous benefits to disadvantaged businesses aside from eligibility for the SCC program.[34] Eligibility requires "small" size and 51% ownership by individuals socially and economically disadvantaged. *See* 13 C.F.R. § 124.103. Subsection 8(a) regulations incorporate a presumption that enumerated minorities are socially disadvantaged, *see* 13 C.F.R. § 124.105(b)(1), and others can prove social disadvantage by clear and convincing evidence, *see id.* § 124.105(c). The presumption of disadvantage is in theory rebuttable by a third party. *See* 49 C.F.R. § 23.69. All businesses must

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[34] Although Adarand lacks standing to challenge the constitutionality of the § 8(a) program per se, we consider its provisions insofar as they are relevant to the use of racially-conscious presumptions in determining certification of DBEs for the SCC program challenged here.

separately prove economic disadvantage. *See id.* § 124.106(a). Eligibility for the § 8(a) program confers an automatic presumption of disadvantage under § 8(d). *See* 15 U.S.C. § 637(d)(3)(C).

2. Subsection 8(d)

The relevant portions of § 8(d) in themselves require only the inclusion of a provision in federal contracts stating the government's policy of maximizing contracting opportunities for small businesses, including those owned and controlled by socially and economically disadvantaged individuals. *See* 15 U.S.C. § 637(d)(1)-(3).[35] Subsection (d) is relevant to this litigation, however, insofar as the definition set forth therein serves as a basis for certifying small businesses as disadvantaged for purposes of compensating prime contractors under the SCC. *See* 49 C.F.R. § 23.53.[36] Like § 8(a), § 8(d) includes

[35] There is no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit or that Adarand has and will continue to bid for contracts or subcontracts covered by those paragraphs. *See* 15 U.S.C. § 637(d)(4)-(6).

[36] The relevant state DBE program at the time of the contract at issue, under which Adarand's competitor was certified as a DBE, provided that "persons who are members of [specified racial/ethnic minorities] are 'rebuttably presumed' to be socially and economically disadvantaged." (Appellants' App. at 131.) Pursuant to *Adarand VI*, because Colorado's revised program may be inconsistent with federal requirements, we direct our inquiry to the possibility of reinstatement of the prior state DBE certification requirements, as informed by federal law and regulation.

language instructing contractors to afford a presumption of social disadvantage based on race. *See id.* The Court stated that certain regulations based on § 8(d) "appear[ ] to require an individualized, although 'less restrictive,' showing of economic disadvantage." *Adarand III*, 515 U.S. at 207 (quoting 13 C.F.R. § 124.106(b)). However, other regulations provide for presumptions of both social and economic disadvantage. *See Adarand III*, 515 U.S. at 207-08 (citing 48 C.F.R. §§ 19.011, 19.703(a)(2)). The Court was thus "left with some uncertainty as to whether participation in the [§] 8(d) subcontracting program requires an individualized showing of economic disadvantage." *Adarand III*, 515 U.S. at 208.[37] Both presumptions of disadvantage are theoretically rebuttable by a third party. (*See* Appellants' App. at 131.)

B. STURAA and ISTEA provisions

STURAA and ISTEA are relevant insofar as they incorporate the presumption of disadvantage from SBA § 8(d). *See* STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B) (providing that the term "socially and economically disadvantaged individual" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto."). Both measures set

[37] As noted, those portions of § 8(d) at issue here perhaps may be more properly characterized as a requirement that a clause be included in contracts than as a discrete program. However, the Supreme Court has characterized the requirements as a discrete program, and we note that they are certainly relevant to the SCC program at issue because they inform the criteria for certification of DBE participants by state agencies.

forth aspirational goals of 10% DBE participation in federal subcontracting. *See* ISTEA § 1003(b)(1).

C. Subcontracting Compensation Clause

The particular means of implementation of the various statutory goals and directives at issue in this litigation is the SCC. This clause provides a financial bonus of up to 10% of an approved subcontract (no more than 1.5% or 2% of the original contract, depending on how many DBEs are employed) to a prime contractor in return for employing a DBE. (*See* Appellants' App. at 55-56.)[38]

[38] The Supreme Court in *Adarand III* stated that "[f]ederal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that '[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.' " 515 U.S. at 205 (quoting 15 U.S.C. §§ 637(d)(2), (3)). However, examination of the statute reveals that 15 U.S.C. § 637, while providing for inclusion in most federal agency contracts of a clause stating that "[i]t is the policy of the United States that . . . small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency," 15 U.S.C. § 637(d)(3)(A), the relevant provisions of § 8(d) do not require the particular contract provision at issue here: "[m]onetary compensation . . . for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals," *Adarand III*, 515 U.S. at 209 (citation omitted). *Cf.* 15 U.S.C. § 637(d)(4)(E). Rather, that clause, the SCC, was established administratively by the

Subcontractors must be certified as DBEs by "the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer" pursuant to the "[§] 8(a) or [§] 8(d) program, or certification by a State under the DOT regulations." *Adarand III*, 515 U.S. at 209-10.

D. Post-1996 Changes

1. SBA

There have been no significant changes to § 637(a) or (d) relevant to the Adarand litigation after 1996. Virtually the only changes to these statutory sections were additions of language including other groups in the SBA's affirmative action program: 1995 (women); 1998 ("HUBZone small business concerns"); and 2000 (veterans). Likewise, the key language in § 644(g)(1) – "The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established

Federal Lands Highway Program ("FLHP") of the Department of Transportation ("DOT") pursuant to the FLHP's obligations under 15 U.S.C. § 644(g). (*See* Appellants' App. at 33.) In *Adarand II*, 16 F.3d at 1545-56, ("*Adarand II*"), we concluded that the FLHP was acting within its delegated power under § 644(g) in promulgating the SCC. The Supreme Court, in altering the equal protection standard of scrutiny applicable to federal action in *Adarand III*, did not disturb this statutory conclusion. Therefore it remains law of the case that the SCC constitutes an exercise of the FLHP's delegated authority under § 644(g), and we discern no clear error in that prior decision or manifest injustice sufficient to warrant overriding the law of the case doctrine. *See Agostini*, 521 U.S. at 236; *McIlravy*, 204 F.3d at 1034-35.

at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year" – has not changed. However, § 644(g)(1) has been amended at various times during the litigation to include government-wide contracting goals for other groups, such as women, service-disabled veterans, and HUBZone small business concerns.

Of the regulations implementing § 8(a) of the SBA, 13 C.F.R. §§ 124.1 *et seq.*,[39] two regulations – those defining social and economic disadvantage – are relevant to this litigation and differ significantly from their 1996 counterparts. The most extensive changes were made in 1998 and are present in the current regulations.

The regulation defining social disadvantage are presently located at 13 C.F.R. § 124.103, and its language, preceding the list of presumptively socially disadvantaged groups, has changed. The current regulation states: "There is a rebuttable presumption that the following individuals are socially disadvantaged. . . . " 13 C.F.R. § 124.103(b)(1) (2000); *see also id.* § 124.103(b)(3) ("The presumption of social disadvantage may be overcome with credible evidence to the contrary."). This change reemphasizes that the presumption of social disadvantage based on group membership is not absolute.

In addition, the burden on members of unlisted groups to show they are socially disadvantaged has been

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[39] The § 8(d) program regulations are located at 48 C.F.R. pt. 19, but they specifically incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B. *See* 48 C.F.R. § 19.001 (2000); 13 C.F.R. § 124.1002(a) (2000) (incorporating 13 C.F.R. pt. 124, subpt. A).

reduced. Currently, social disadvantage may be established by a "preponderance of the evidence," rather than by the former "clear and convincing" evidentiary standard. *Compare* 13 C.F.R. § 124.103(c)(1) (2000) *with* 13 C.F.R. § 124.105(c)(1) (1997). The Small Business Administration explains that this change was meant to more narrowly tailor the § 8(a) program in light of *Adarand III*. *See 8(a) Business Development/Small Disadvantaged Business Status Determinations*, 63 Fed. Reg. 35,726, 35,728 (1998) ("In response to the Supreme Court's decision in *Adarand [III]* . . . , the Department of Justice recommended the 'preponderance of the evidence' standard for government-wide disadvantaged business programs. [The Small Business Administration] . . . continues to believe that the use of this standard strengthens the defense of the [§] 8(a) B[usiness] D[evelopment] program.").

The relevant regulations regarding economic disadvantage are presently located at 13 C.F.R. § 124.104. The *Adarand III* majority expressed concern about the "apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the [§] 8(a) and [§] 8(d) programs." *Adarand III*, 515 U.S. at 238-39. The new regulations rectify that discrepancy, retaining the more precise definition previously applicable to the § 8(a) program, which requires comparing the applicant to those who are not socially disadvantaged. *See* 13 C.F.R. § 124.104(a) (2000). The current regulations also impose a new requirement on applicants: They must submit a narrative statement describing their economic disadvantage. *See id.* § 124.104(b)(1) (2000).

As to duration of DBE certification, the current § 8(d) certification program regulations provide for certification of a business as socially disadvantaged for three years after either the initial certification or other administrative determination. *See* 13 C.F.R. § 124.1014 (2000). If a DBE wishes to retain its certification for longer than three years, it must "submit a new application and receive a new certification." *Id.* § 124.1014(c).

2. STURAA, ISTEA, and TEA-21

The language in STURAA, ISTEA, and TEA-21 concerning the DBE program is similar. Notably, the requirement that "not less than 10 percent of the amounts" authorized under those Acts "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals" remains unchanged in all three statutes. TEA-21 § 1101(b)(1), 112 Stat. at 113; ISTEA § 1003(b)(1), 105 Stat. 1919; STURAA § 106(c)(1), 101 Stat. 132.

The only significant change in the transportation appropriations statutes is the addition in both § 1003(b) of ISTEA, 105 Stat.1920-22, and § 1101(b)(6) of TEA-21, 112 Stat. 114-15, of a requirement that the Comptroller General conduct a study and report to Congress regarding several aspects of the DBE program.

In ISTEA § 1003(b)(5), 105 Stat. 1920-22, the Comptroller General is given twelve months to study and prepare a report discussing: graduation from the program; the extent of out-of-state contracting with disadvantaged businesses by prime contractors; whether adjustments

could be made "with respect to Federal and State participation in training programs and with respect to meeting capital needs and bonding requirements" to increase the success of disadvantaged business enterprises; possible "revisions and additions to criteria used to determine the performance and financial capabilities of" DBEs; the costs and benefits of meeting the goal of 10% participation by DBEs; the effect of the program on the construction industry; the certification process; and the implementation of the program by states.

In TEA-21 § 1101(b)(6), 112 Stat. 114-15, the Comptroller General is given three years to study and prepare a report discussing: the number, participation in prime contracts and subcontracts, gross receipts, and net worth of DBEs; the overall costs of the DBE program, "including administrative costs, certification costs, additional construction costs, and litigation costs"; discrimination against DBEs in various markets including transportation contracting, financial, insurance, credit and bonding; the costs of any court order striking down the DBE program; and the impact of the program on competition and the creation of jobs.

The regulations implementing affirmative action programs of STURAA, ISTEA, and TEA-21 have undergone the most change of any of the relevant regulations at issue over the course of the instant litigation. According to the federal Department of Transportation, the changes were made "primarily in response to the 'narrow tailoring' requirements of *Adarand [III],*" and the final rule "complies with the requirements that the courts have established for a narrowly tailored affirmative action program." *Participation by Disadvantaged Business Enterprises*

in Department of Transportation Programs, 64 Fed. Reg. 5096 (1999); *see also id.* at 5101-03 (discussing the requirements of narrow tailoring and the ways in which the new regulations attempt to meet those requirements). The current regulations, which apply to any federal highway funds authorized under ISTEA or TEA-21, *see* 49 C.F.R. § 26.3(a) (2000), are located at 49 C.F.R. pt. 26.

The current regulations specify that the presumption of economic disadvantage automatically is rebutted for any individual whose net worth is above $750,000, without a requirement of further proceedings. *See id.* § 26.67(b)(1) (2000). This conforms with SBA regulations concerning re-certification of economic disadvantage. *See* 13 C.F.R. § 124.104 (2000). The current regulations also retain the requirement that businesses not exceed a certain amount of gross receipts in order to be eligible for the DBE program. *See* 49 C.F.R. § 26.65(b) (2000).

Regarding the allocation of subcontracts to DBEs, the current regulations explicitly prohibit the use of quotas. *See id.* § 26.43(a). Similarly, the current regulations prohibit use of set-asides except in "limited and extreme circumstances . . . when no other method could be reasonably expected to redress egregious instances of discrimination." *Id.* § 26.43(b). Although acknowledging that ISTEA and TEA-21 set a goal of 10% DBE participation in government contracts, the current regulations term this "an aspirational goal at the national level," *id.* § 26.41(b), which "does not authorize or require recipients to set

overall or contract goals at the 10 percent level, or any other particular level," *id.* § 26.41(c).[40]

Extensive regulatory requirements must be met before goals may be set for DBE participation in a particular market. *See id.* § 26.45. Goals must be based on "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate" and must make "reference to the relative availability of DBEs in [the recipient's local] market." *Id.* § 26.45(b). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." *Id.* § 26.45(c). Such evidence may include census data and valid disparity studies. *See id.* § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goals by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. *See id.* § 26.45(d). When submitting these goals, the recipient must include a description of the methodology and evidence used in setting them. *See id.* § 26.45(f)(3). Finally, there is no requirement that the recipient actually meet its goals, merely that it make a good faith effort to do so; failure to meet goals will not subject a recipient to penalties or to being held in noncompliance as long as good faith efforts were made. *See id.* § 26.47(a).

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[40] The term "recipient" is defined by the regulations as "any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the . . . FHWA." 46 C.F.R. § 26.5 (2000). The FLHP is such a program and therefore is a "recipient" for purposes of the relevant regulations. *See* 23 C.F.R. § 645.105(f) (2000).

Wherever possible, the current regulations require recipients to use race-neutral means to "meet the maximum feasible portion" of their overall DBE participation goals. *Id.* § 26.51(a); *see also id.* § 26.51(f) (if a recipient can meet its overall goals through race-neutral means, it must implement its program without the use of contract goals). The current regulations also outline several race-neutral means available to program recipients including helping overcome bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See id.* § 26.51(b).

For those not falling into one of the categories to which a presumption of social disadvantage applies, the current regulations retain procedures for non-minorities to participate in the DBE program. Consistent with the changes in SBA regulations, proof of social and economic disadvantage by those not so presumed may be shown by a preponderance of the evidence. *See id.* §§ 26.61(d), 26.67(d). Additionally, the current regulations require recipients to make sure DBEs are not "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate." *Id.* § 26.33(a).

Finally, as to any part of the foregoing DBE statutory and regulatory framework, the current regulations allow recipients to seek waivers and exemptions, despite the already non-mandatory nature of the DBE programs. *See id.* § 26.15. In this way, the statutory and regulatory scheme provides yet another means of ensuring that the program is not applied more broadly than warranted.

3. SCC

The government maintains, and Adarand does not dispute, that the SCC, which spawned this litigation in 1989, is no longer in use. (*See* Appellants' Supp. Br. Attach. 1 (memorandum from Arthur E. Hamilton, Federal Lands Program Manager to Federal Lands Highway Division Engineers stating that "[t]he SCC will not be placed in any future invitations for bids" and "shall be removed by amendment from any invitations for bids where the bid opening has not taken place").)

In November 1997, before the discontinuation of its use, the SCC was revised by the addition of a new section[41] which creates further conditions of eligibility for the program. (*See id.* Attach. 2 (new section of the SCC).) To begin with, subject to modification based on DBE availability, at least 10% of the prime contract must go to DBEs for SCC eligibility. If a DBE subcontractor is hired, that DBE may only contract out to non-DBEs "for onsite work . . . incidental to, and necessary for the accomplishment of," the subcontract, in an amount not to exceed 50 percent of the value of the DBE's subcontract. (*Id.* at 2.) In addition to the 1.5-2% cap on the total amount of the prime contract that may be awarded pursuant to the SCC,

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[41] It is unclear from the record whether the 1997 revision to the SCC entailed the addition of a new section or the replacement of the previous one. The revision instructs those using the SCC to "[a]dd the following [revision]," (Appellants' Supp. Br. Attach. 2 at 1), rather than replace the existing SCC, and we thus assume the 1997 revision is an addition to the SCC. However, in either case, our analysis in this opinion remains the same.

the new section adds a further cap of $50,000 if subcontracting to one DBE and $100,000 if subcontracting to more than one DBE.

The revised SCC retains the provision furnishing prime contractors with "[c]ompensation . . . to locate train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field," but adds the explanation that this compensation is provided "to offset costs and anticipated risks associated with awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals (DBE)." (*Id.* at 1.)

Finally, the new section provides an alternative route to certification, "ad hoc certification" based on "self certification" accompanied by the requisite documents to demonstrate qualification for the program, as well as "documentation showing the disposition of any previous application for certification the subcontractor has made to any Federal, State or local Government agency." (*Id.*) If a would-be self-certified DBE has already been rejected by a government agency, ad hoc certification will not be granted "unless the reasons for [the previous] denial have been resolved." (*Id.*)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff – Appellee,

v.

FEDERICO PENA, Secretary of the Department of Transportation; RODNEY E. SLATER, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Defendants – Appellants,

No. 97-1304

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

ORDER

Filed April 5, 2000

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

The following order is entered nunc pro tunc to April 3, 2000 to include the case number for this appeal.

A petition for rehearing en banc was received by the court on March 14, 2000; however, a petition for rehearing en banc is improper under 10th Cir. R. 35.7. Therefore, the document is construed as a petition for panel rehearing and is denied.

Additionally, counsel for the appellee is reminded that if they wish to respond to the government's supplemental brief that the deadline is April 4, 2000.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Audrey F. Weigel
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff – Appellee,

v.

RODNEY E. SLATER, Secretary of the Department of Transportation; KENNETH R. WYKLE Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Defendants – Appellants.

No. 97-1304

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

ORDER

Filed February 18, 2000

Before **LUCERO, McKAY** and **MURPHY,** Circuit Judges.

This matter comes on for consideration of the judgment of the Supreme Court of the United States reversing the judgment of this court entered March 4, 1999, and remanding the cause to this court for further proceedings.

Upon consideration whereof, it is the order of this court as follows:

1. The mandate issued to the United States district Court for the District of Colorado on May 27, 1999, is recalled.

2. The judgment of this court filed March 4, 1999, is vacated.

Counsel will be notified if this court desires further briefing prior to disposition of this appeal upon remand.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Kathleen M. Fabrizio
Deputy Clerk

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

v.

Rodney SLATER, Secretary of Transportaiton, et al.

No. 99-295.2
Decided Jan. 12, 2000.

PER CURIAM.

I

Congress has adopted a policy that favors contracting with small businesses owned and controlled by the socially and economically disadvantaged. See § 8(d)(1) of the Small Business Act, as added by § 7 of Pub. L. 87-305, 75 Stat. 667, and as amended, 15 U.S.C. § 637(d)(1) (1994 ed., Supp. IV). To effectuate that policy, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, § 1003(b), 105 Stat. 1919, which is an appropriations measure for the Department of Transportation (DOT), seeks to direct 10 percent of the contracting funds expended on projects funded in whole or in part by the appropriated funds to transportation projects employing so-called disadvantaged business enterprises.[1] ISTEA, § 1003(b)(1).

[1] Congress recently enacted the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, Tit. I, § 1101(b), 112 Stat. 113, the successor appropriations measure to ISTEA. Although the new Act contains similar provisions, it is technically the provisions of ISTEA that apply to funding obligated in prior fiscal years but not yet expended.

To qualify for that status, the small business must be certified as owned and controlled by socially and economically disadvantaged individuals. DOT does not itself conduct certifications, but relies on certifications from two main sources: the Small Business Administration, which certifies businesses for all types of federal procurement programs, and state highway agencies, which certify them for purposes of federally assisted highway projects. The federal regulations governing these certification programs, see 13 CFR pt. 124 (1999) (Small Business Administration); 64 Fed. Reg. 5096-5148 (1999) (to be codified in 49 CFR pt. 26) (DOT for state highway agencies), require that the certifying entity *presume* to be socially disadvantaged persons who are black, Hispanic, Asian Pacific, Subcontinent Asian, Native Americans, or members of other groups designated from time to time by the Small Business Administration. See 13 CFR § 124.103(b); 64 Fed. Reg. 5136 (§ 26.67). State highway agencies must in addition presume that women are socially disadvantaged. *Id.*, at 5136 (§ 26.67). Small businesses owned and controlled by persons who are not members of the preferred groups may also be certified, but only if they can *demonstrate* social disadvantage. See 13 CFR § 124.103(c); 64 Fed. Reg. 5136-5137 (§ 26.67(d)); *id.*, at 5147-5148 (pt. 26, subpt. D, App.E). Third parties, as well as DOT, may challenge findings of social disadvantage. See 13 CFR § 124.1017(a); 64 Fed. Reg. 5142 (§ 26.87).

II

In 1989, DOT awarded the prime contract for a federal highway project in Colorado to Mountain Gravel &

Construction Company. The contract included a Subcontractor Compensation Clause – which the Small Business Act requires all federal agencies to include in their prime contracts, see 15 U.S.C. § 637(d) – rewarding the prime contractor for subcontracting with disadvantaged business enterprises, see § 637(d)(4)(E). Petitioner, whose principal is a white man, submitted the low bid on a portion of the project, but Mountain Gravel awarded the subcontract to a company that had previously been certified by the Colorado Department of Transportation (CDOT) as a disadvantaged business enterprise.

Petitioner brought suit against various federal officials, alleging that the Subcontractor Compensation Clause, and in particular the race-based presumption that forms its foundation, violated petitioner's Fifth Amendment right to equal protection. The Tenth Circuit, applying the so-called intermediate scrutiny approved in some of our cases involving classifications on a basis other than race, see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), upheld the use of the clause and the presumption. *Adarand Constructors, Inc. v. Pea*, 16 F.3d 1537 (1994). Because DOT's use of race-based measures should have been subjected to strict scrutiny, we reversed and remanded for the application of that standard. *Adarand Constructors, Inc. v. Pea*, 515 U.S. 200, 237-239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*Adarand I*).

On remand, the District Court for the District of Colorado held that the clause and the presumption failed strict scrutiny because they were not narrowly tailored. *Adarand Constructors, Inc. v. Pea*, 965 F.Supp. 1556 (1997)

(*Adarand II*). Specifically, the court held the presumption that members of the enumerated racial groups are socially disadvantaged to be both overinclusive and underinclusive, because it includes members of those groups who are not disadvantaged and excludes members of other groups who are. *Id.*, at 1580. The District Court enjoined DOT from using the clause and its presumption.[2] *Id.*, at 1584. Respondents appealed to the Tenth Circuit.

Shortly thereafter, and while respondents' appeal was still pending, petitioner filed a second suit in the District Court this time naming as defendants certain Colorado officials, and challenging (on the same grounds) the State's use of the federal guidelines in certifying disadvantaged business enterprises for federally assisted projects. *Adarand Constructors, Inc. v. Romer*, Civ. No. 97-K-1351 (June 26, 1997). Shortly after this suit was filed, however, Colorado altered its certification program in response to the District Court's decision in *Adarand II*. Specifically, the State did away with the presumption of social disadvantage for certain minorities and women, App. to Pet. for Cert. 109-111, and in its place substituted a requirement that all applicants certify on their own account that each of the firm's majority owners "has experienced social disadvantage based upon the effects of racial, ethnic or gender discrimination," *id.*, at 110.

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[2] Before the Tenth Circuit, the parties disagreed as to whether the scope of the District Court's remedial order was appropriate. In characterizing that order as we do here, we do not intend to take a position in that dispute.

Colorado requires no further showing of social disadvantage by any applicant.

A few days after Colorado amended its certification procedure, the District Court held a hearing on petitioner's motion for a preliminary injunction in *Romer*. The District Court took judicial notice of its holding in *Adarand II* that the Federal Government had discriminated against petitioner's owner "by the application of unconstitutional rules and regulations." *Id.*, at 136. As a result of that race-based discrimination, the District Court reasoned, petitioner likely was eligible for disadvantaged-business status under Colorado's system for certifying businesses for federally assisted projects – the system at issue in *Romer*. *Id.*, at 137. The District Court therefore denied petitioner's request for a preliminary injunction. *Id.*, at 138. Petitioner then requested and received disadvantaged-business status from CDOT.

Meanwhile, respondents' appeal from the District Court's decision in *Adarand II* was pending before the Tenth Circuit. Upon learning that CDOT had given petitioner disadvantaged-business status, the Tenth Circuit held that the cause of action was moot, and vacated the District Court's judgment favorable to petitioner in *Adarand II*. 169 F.3d 1292, 1296-1297, 1299 (C.A.10 1999). Petitioner filed a petition for certiorari.

III

In dismissing the case as moot, the Tenth Circuit relied on the language of the Subcontractor Compensation Clause, which provides that "[a] small business concern will be considered a [disadvantaged business

enterprise] after it has been certified as such by . . . any State's Department of Highways/Transportation." *Id.*, at 1296. Because CDOT had certified petitioner as a disadvantaged business enterprise, the court reasoned, the language of the clause indicated that the Federal Government also had accepted petitioner's certification for purposes of federal projects. As a result, petitioner could no longer demonstrate " 'an invasion of a legally protected interest' that is sufficiently 'concrete and particularized' and 'actual or imminent' " to establish standing. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Because, the court continued, petitioner could not demonstrate such an invasion, its cause of action was *moot*. 169 F.3d, at 1296-1297.

In so holding, the Tenth Circuit "confused mootness with standing," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, ___ U.S. ___, ___, 120 S.Ct. 693, 709, 145 L.Ed. 2d 610 (2000), and as a result placed the burden of proof on the wrong party. If this case is moot, it is because the Federal Government has accepted CDOT's certification of petitioner as a disadvantaged business enterprise, and has thereby ceased its offending conduct. Voluntary cessation of challenged conduct moots a case, however, only if it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) (emphasis added). And the " 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the*

party asserting mootness." *Friends of Earth, ante*, at 709 (emphasis added) (quoting *Concentrated Phosphate Export Assn., supra*, at 203, 89 S.Ct. 361).

Because respondents cannot satisfy this burden, the Tenth Circuit's error was a crucial one. As common sense would suggest, and as the Tenth Circuit itself recognized, DOT accepts only "valid certification[s]" from state agencies. 169 F.3d, at 1298. As respondents concede, however, see Brief in Opposition 13-14, n. 6, DOT has yet to approve-as it must-CDOT's procedure for certifying disadvantaged business enterprises, see 64 Fed. Reg. 5129 (1999) (49 CFR § 26.21(b)(1)) ("[The State] must submit a [disadvantaged business enterprise] program conforming to this part by August 31, 1999 to the concerned operating administration").

DOT has promulgated regulations outlining the procedure state highway agencies must follow in certifying firms as disadvantaged business enterprises. See *id.*, at 5096-5148 (pt. 26). As described earlier, those regulations require the agency to presume that "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the [Small Business Administration]," are socially disadvantaged. *Id.*, at 5136 (§ 26.67(a)(1)). Before individuals not members of those groups may be certified, the state agency must make individual determinations as to disadvantage. See *id.*, at 5136-5137 (§ 26.67(d)) ("In such a proceeding, the applicant firm has the burden of demonstrating to [the state highway agency], by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged"); *Id.*, at

5147-5148 (pt. 26, subpt. D, App. E) (providing list of "elements" that highway agencies must consider in making individualized determinations of social disadvantage). CDOT's new procedure under which petitioner was certified applies no presumption in favor of minority groups, and accepts without investigation a firm's self-certification of entitlement to disadvantaged-business status. See App. to Pet. for Cert. 109-111. Given the material differences (not to say incompatibility) between that procedure and the requirements of the DOT regulations, it is not at all clear that CDOT's certification is a "valid certification," and hence not at all clear that the Subcontractor Compensation Clause requires its acceptance.

Before the Tenth Circuit, respondents took pains to "expres[s] no opinion regarding the correctness of Colorado's determination that [petitioner] is entitled to [disadvantaged-business] status." Motion by the Federal Appellants to Dismiss Appeal as Moot and to Vacate the District Court Judgment in No. 97-1304, p. 3, n. 2. Instead, they stated flatly that "in the event there is a third-party challenge to [petitioner's] certification as a [disadvantaged business enterprise] and the decision on the challenge is appealed to DOT, DOT may review the decision to determine whether the certification was proper." *Id.*, at 3-4, n. 2. In addition, DOT itself has the power to require States to initiate proceedings to withdraw a firm's disadvantaged status if there is "reasonable cause to believe" that the firm "does not meet the eligibility criteria" set forth in the federal regulations. 64 Fed. Reg. 5142 (§ 26.87(c)(1)). Given the patent incompatibility of the certification with the federal regulations, it is far from clear that these possibilities will not become reality.

Indeed, challenges to petitioner's disadvantaged-business status seem quite probable now that the Tenth Circuit, by vacating *Adarand II*, has eliminated the sole basis for petitioner's certification in the first place.

The Tenth Circuit dismissed these possibilities as insufficiently particular and concrete to grant standing and therefore "too conjectural and speculative to avoid a finding of mootness." 169 F.3d, at 1298 (internal quotation marks omitted). As we recently noted in *Friends of the Earth*, however, "[t]he plain lesson of [our precedents] is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Ante*, at 709. Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *ante*, at 708, petitioner's cause of action remains alive.

* * *

It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought. Because that is not the case here, the petition for writ of certiorari is granted, the judgment of the United States Court of Appeals for the Tenth Circuit is reversed, and the case is

remanded for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,	)	
Plaintiff-Appellee,	)	
v.	)	
FEDERICO PENA, Secretary of the Department of Transportation; RODNEY E. SLATER, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,	)	No. 97-1304
Defendants-Appellents,	)	
PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,	)	
Amici Curiae.	)	

ORDER

(Filed May 19, 1999)

Before **LUCERO, McKAY, and MURPHY**, Circuit Judges.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Illegible
Deputy Clerk

ADARAND CONSTRUCTORS, INC., a Colorado corporation, Plaintiff-Appellee,

v.

Rodney E. SLATER, Secretary of the Department of Transportation; Kenneth R. Wykle, Administrator of the Federal Highway Administration; Vincent F. Schimmoller, Administrator of Region VIII of the Federal Highway Administration; Larry C. Smith, Engineer of the Central Federal Lands Highway Division, Defendants-Appellants. Pacific Legal Foundation; Employment Law Center; Minority Business Enterprise Legal Defense and Education Fund, Inc., Amici Curiae.

No. 97-1304.

United States Court of Appeals,
Tenth Circuit.

March 4, 1999.

William Perry Pendley (Todd S. Welch, with him on the brief), Mountain States Legal Foundation, Denver, Colorado, for Plaintiff-Appellee.

Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief.

William C. McNeill, III and Julian A. Gross for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie A. Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

Before LUCERO, McKAY and MURPHY, Circuit Judges.

LUCERO, Circuit Judge.

This case began when plaintiff Adarand Constructors, Inc., challenged the constitutionality, under the Equal Protection Clause of the Fifth Amendment, of certain subcontractor compensation clauses (SCCs) used by the Department of Transportation to enhance government contracting opportunities for small businesses that are owned and controlled by socially and economically disadvantaged individuals. A panel of this court previously upheld these same SCCs under "intermediate scrutiny." *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir.1994) (*Adarand II*).[1] Holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," the Supreme Court reversed, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*Adarand III*) (overruling *Metro Broadcasting v. FCC*, 497 U.S. 547, 110 S.Ct.

[1] Appellants are sued in their official capacities. The caption in this case has thus been amended to incorporate the substitution of Rodney E. Slater as Secretary of Transportation and Kenneth R. Wykle as Administrator of the Federal Highway Administration, pursuant to Fed. R.App. P. 43(c)(1).

2997, 111 L.Ed.2d 445 (1990)), and remanded the case to district court for a determination of whether the SCCs are narrowly tailored to serve a compelling governmental interest. Applying strict scrutiny, the district court granted summary judgment for plaintiffs. *See Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556 (D.Colo.1997) (*Adarand IV*).

The government now appeals, arguing that the district court incorrectly found that the subcontractor compensation clause (SCC) program was not sufficiently narrowly tailored to a compelling governmental interest as to survive strict scrutiny. Additionally, the government argues that the district court erred in ruling the use of the SCC program to be unconstitutional not only in the direct federal contracting program administered by the Department of Transportation, but also in federal aid programs operated by the State of Colorado with federal financial assistance. However, as we find this case has become moot, we do not resolve those issues, but rather remand and direct the district court to vacate its judgment below, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

I

The facts of this case and the program at issue have been set out in numerous judicial opinions, *see, e.g., Adarand III*, 515 U.S. at 205-10, 115 S.Ct. 2097, and we need not repeat them in detail. The essential matter relevant to our disposition is that Adarand seeks declaratory and injunctive relief against the use of SCCs that provide

additional compensation to federal government contractors employing subcontractors that qualify as Disadvantaged Business Enterprises (DBEs). The company claims that the various routes to DBE certification incorporate impermissible presumptions of social disadvantage based on race. The Supreme Court held that Adarand alleged a concrete and particularized injury sufficient to grant standing to pursue its challenge, in that the classification at issue "prevent[s] the plaintiff from competing on an equal footing." *Id.* at 211, 115 S.Ct. 2097 (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)). The Court held Adarand's injury sufficiently actual or imminent to satisfy standing requirements because Adarand had shown that it was "very likely" to bid, within a year, on another federal contract offering incentives for hiring small disadvantaged subcontractors. *Adarand III*, 515 U.S. at 211, 115 S.Ct. 2097.

Since the district court's grant of judgment in this case, however, the Colorado Department of Regulatory Agencies has certified Adarand as a DBE, which certification entitles Adarand to the benefit of the SCC under challenge. The clause at issue provides that "[a] small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or by any State's Department of Highways/Transportation." *See* Appellant's Br., Addendum 3, at 1 (Federal Lands Highway DBE/WBE Subcontract Compensation Clause) (emphasis added).

The circumstances leading to Adarand's DBE certification are as follows. After issuance of *Adarand IV*,

Adarand filed suit against state officials challenging Colorado's use of DBE guidelines in administering federally assisted highway programs. Colorado subsequently modified its DBE regulations to eliminate the presumption of social and economic disadvantage for racial and ethnic minorities, and to condition the social disadvantage branch of its DBE inquiry solely on the applicant's certification that he or she is socially disadvantaged.

Following this modification, the district court denied Adarand's motion for a preliminary injunction for lack of standing. The court apparently reasoned that as a result of the SCC program and the racial presumptions employed in awarding DBE status, Randy Pech, Adarand's principal, had been socially disadvantaged as a white male. According to the court, Adarand Constructors therefore possessed an adequate remedy at law through inclusion in the DBE program, and thus lacked standing to obtain a preliminary injunction against the state's use of the SCC in question. When Adarand applied for DBE status after the court's ruling, Pech certified that he was socially disadvantaged, and Adarand was granted the status.

II

As Adarand is now entitled to the preference it challenges, it can no longer assert a cognizable constitutional injury. "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067, 137

L.Ed.2d 170 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). These requirements apply equally to cases on appeal. *See id.* To qualify for adjudication in the federal courts, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* at 1068 (citations omitted). Adarand seeks prospective relief invalidating the use of the SCC, and must therefore demonstrate a " 'real and immediate threat that [it] would again' suffer similar injury in the future." *Adarand III*, 515 U.S. at 211, 115 S.Ct. 2097 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)); *see also Buchwald v. University of New Mexico Sch. of Med.*, 159 F.3d 487, 493 (10th Cir.1998) (concluding that plaintiff has no standing to seek prospective injunction and declaratory relief against consideration of residency in medical school admissions without showing threat of similar injury in future). As a DBE itself, Adarand cannot make that showing, and hence the case before us is moot.

Adarand raises several arguments as to why the case should not be considered moot. First, it argues that it received DBE status only as a result of the decision below, which led the Transportation Commission of Colorado to adopt the DBE policy under which Adarand was subsequently certified. This possibility does not defeat mootness. We have previously held that a city's withdrawal of a policy struck down by a district court rendered plaintiffs's challenge to that policy moot, notwithstanding the fact that the policy had been withdrawn because it had been ruled unconstitutional. *See 19 Solid Waste Dep't Mechanics v. Albuquerque*, 76 F.3d 1142, 1143-44 (10th Cir.1996). Although the district court's comments in

denying Adarand's motion for a preliminary injunction in *Adarand Constructors, Inc. v. Romer* may have prompted Pech's application for DBE status, the dispositive fact for our standing analysis is that he now has that status. Further, Adarand faces no collateral legal consequences from the SCC program. *Cf. Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

Second, Adarand argues that this case involves actions capable of repetition yet evading review. *See Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). Adarand contends that if this case is dismissed and the judgment vacated, then the company will be decertified because its status as socially disadvantaged is contingent upon the district court's judgment that the SCC discriminates on the basis of race.[2] The Supreme Court has held that an action for prospective relief can avoid mootness under the doctrine of "capable of repetition yet evading review . . . only in the exceptional situations . . . where the following two circumstances are present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (citations and internal quotations omitted). Adarand fails to show that the circumstances of its challenge are too brief for complete litigation. To show a reasonable expectation that it is vulnerable to repetition of the same action

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[2] Insofar as this is also an argument against vacating the judgment below, we address it again infra Section III.

by the government, Adarand attempts to draw analogy to the situation of the plaintiff in *Rex v. Owens ex rel. State of Oklahoma*, 585 F.2d 432, 434-35 (10th Cir.1978), in which we found the involuntary commitment of a patient to a mental institution "on at least four distinct and separate occasions," *id.* at 435, to be capable of repetition yet evading review. We find no indication that Adarand has been or will be subjected to such repetitive action. Adarand's suggestion, made without factual support, that Colorado will continually revoke Adarand's DBE certification, and then reimpose it to avoid review, does not comprise a "reasonable expectation that the plaintiff will be subjected to the same action again." *Id.* Nor are we shown any evidence that the government "manipulated" both Adarand and Colorado into respectively seeking and conferring DBE status, in an effort to establish a repetitive and unreviewable pattern of certification and revocation.

Third, Adarand argues that because its DBE certification is not recognized by the federal government, it is subject to denial of the right to compete equally for federal highway subcontracts in Wyoming and New Mexico. Under the SCC, however, a small business is entitled to DBE treatment "after it has been certified as such . . . by . . . any State's Department of Highways/Transportation." Refusal of certification by other states therefore does not affect Adarand's DBE preference in Colorado – and the use of the SCC in Colorado highway construction is the only issue before us. In any event, the government concedes that the language of the SCC entitles Adarand to the federal subcontracting preference based on any valid certification, regardless of whether it is certified by

the particular state in which the highway construction occurs.

Fourth, Adarand argues that because the new Colorado DBE regulations do not comply with federal regulations and might be rejected by the Department of Transportation, Adarand cannot rely on its DBE status to secure the benefits of the federal SCC program. However, even were it true that the Colorado program is inconsistent with federal regulations, which the government contests, *see* 49 C.F.R. § 23.62 (allowing state DBE programs to certify nonminority individuals on a case-by-case basis), Adarand does not allege a sufficiently particular and concrete injury to grant it standing to challenge the program.[3] The possibility that Adarand faces future injury from the SCC if either Colorado's new program is rejected by the Department of Transportation or Adarand is otherwise decertified is "too conjectural and speculative to avoid a finding of mootness." *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir.1995) (citing *Anderson v. Green*, 513

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[3] Adarand reads great significance into a footnote in the government's brief declining to express a view on the merits of Adarand's DBE certification. We cannot, however, view the government's refusal to opine on the merits of an issue not before it as indicative of an intention to take action to revoke Adarand's DBE status. Nor has Adarand shown us that the Department of Transportation could even have authority to do so, save in the event of a third party challenge to Adarand's DBE certification followed by administrative appeal to DOT of Colorado's decision. *See* 49 C.F.R. §§ 23.55, 23.69(b)-(c) (establishing conditions for administrative appeal to DOT of state determinations of third party challenges to DBE status). This possibility is too speculative to create a live controversy.

U.S. 557, 559-60, 115 S.Ct. 1059, 130 L.Ed.2d 1050 (1995) (per curiam)).

III

We must also consider whether the circumstances under which this case became moot require us to vacate the judgment of the district court. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950). Generally, "[w]hen a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.' " *Arizonans for Official English*, 117 S.Ct. at 1071 (quoting *Munsingwear*, 340 U.S. at 39, 71 S.Ct. 104). The rationale of this "duty" is to prevent a party from being bound by the preclusive effects of a judgment, "review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 39, 40, 71 S.Ct. 104. The Supreme Court has more recently explained that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994).

However, our duty under *Munsingwear* is not an absolute one. Vacatur is an equitable remedy exercised in the interests of fairness. *See id.* In weighing the appropriateness of vacatur, we examine "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* (citing *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S.

466, 478, 36 S.Ct. 212, 60 L.Ed. 387 (1916)); *see also 19 Solid Waste Dep't Mechanics*, 76 F.3d at 1144-45 (declining to grant vacatur where appellant city mooted case through voluntary withdrawal of policy at issue); *Jones*, 57 F.3d at 923 (granting vacatur when challenged regulations were mooted by intervening legislation).

Although the regulatory change and administrative decision enabling Adarand to gain DBE status were made by Colorado state agencies rather than by the federal government, Adarand argues that this case is nonetheless analogous to cases in which the party seeking vacatur voluntarily causes or plays an active role in causing the case to become moot. *See, e.g., U.S. Bancorp Mortgage Co.*, 513 U.S. at 27-28, 115 S.Ct. 386 (refusing to vacate where parties settle); *19 Solid Waste Dep't Mechanics*, 76 F.3d at 1144-45 (refusing to vacate where appellant caused mootness). The circumstances causing mootness in this case were precipitated by the actions of a third party and Adarand itself, not by the federal government, and there is no evidence that the government sought mootness in an effort "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 27, 115 S.Ct. 386. We have found vacatur in an analogous case where "mootness . . . resulted not from any voluntary action by plaintiffs but rather from circumstances beyond plaintiffs' control and for which they were not responsible." *Jones*, 57 F.3d at 923 (vacating judgment when plaintiff's suit against members of the Colorado Public Utilities Commission mooted by Colorado legislature's recission of challenged taxicab regulations).

It is true that the third party actions leading to Adarand's receiving DBE status were apparently motivated in some part by the district court's decision at issue here. Consequently, vacatur might conceivably lead Colorado to withdraw Resolution No. TC-554 and return to the policy that Adarand originally challenged, thus depriving Adarand of its judgment below. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 27, 115 S.Ct. 386. The injustice to the appellants and to the public interest occasioned by a contrary result, however, is no less real, and significantly less speculative. Because we cannot address the government's arguments against the judgment below, absent vacatur, the federal appellants in this case will be bound by a judgment for which they have had no opportunity for appellate review. Furthermore, the federal government will be bound on a matter of great constitutional importance by an unreviewable district court decision, frustrating the public interest in resolution of such matters through prescribed channels of appellate review.

In conclusion, it would be contrary to the "equitable tradition of vacatur" formalized in *Munsingwear* to hold an appellant to the preclusive effects of an adverse judgment when deprived of the opportunity for appellate review through the actions of a third party. Our task is to "dispose[ ] of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 24, 115 S.Ct. 386 (citations omitted). Although the unusual circumstances of this case make that task a difficult one, we conclude the appropriate course of action in this case is to vacate and remand pursuant to *Munsingwear*. We acknowledge

that – while no longer quick – this case does implicate constitutional issues of substantial importance, and that it has suffered a long path through the federal courts. This history does not, however, relieve us of our duty under the Constitution to address only live cases or controversies.

We therefore VACATE the judgment below and REMAND with directions to dismiss.

ADARAND CONSTRUCTORS, INC., a Colorado Corporation, Plaintiff,
v.
Frederico PEÑA, Secretary of the Department of Transportation, Rodney E. Slater, Administrator of the Federal Highway Administration, Vincent F. Schimmoller, Administrator of Region VIII of the Federal Highway Administration, and Larry C. Smith, Division Engineer of the Central Federal Lands Highway Division, Defendants.

Civ A. No. 90-K-1413.

United States District Court,
D. Colorado.

June 2, 1997.

As Amended June 4, 1997.

Todd S. Welch, Mountain States Legal Foundation, Denver, CO, for plaintiff.

Marisa J. Demeo, Charles E. Leggott, Marybeth Martin, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, Washington, DC, Stephen D. Taylor, Assistant U.S. Attorney, Denver, CO, Lisa MacPhee, Edward V.A. Kussy, Federal Highway Administration, Department of Transportation, Washington, DC, for defendants.

Franklin Lee, Craig Thompson, Minority Business Enterprises, Washington, DC, William C. McNeill, Julian A. Gross, The Employment Law Center, San Francisco, CA, Robert Golten, Boulder, CO, Court Amicae.

MEMORANDUM DECISION ON REMAND

KANE, Senior District Judge.

Following remand from the United States Supreme Court and the Tenth Circuit Court of Appeals, Plaintiff Adarand Constructors, Inc., a highway construction company, seeks declaratory and permanent injunctive relief against Frederico Peña, Secretary of the Department of Transportation (DOT), Rodney E. Slater, Administrator of the Federal Highway Administration (FHA), Vincent F. Schimmoller, Administrator of Region VIII of the FHA, and Larry C. Smith, Division Engineer of the Central Federal Lands Highway Division (CFLHD).[1] Adarand asserts the race-conscious subcontracting compensation clause (SCC) program used by the CFLHD is unconstitutional, violating the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, as well as the civil rights, privileges and immunities secured by the laws of the United States, and the provisions of Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Pending are the parties' cross-motions for summary judgment following remand. *See Adarand Constructors, Inc. v. Peña (Adarand III)*, 515 U.S. 200, 237, 115 S.Ct. 2097, 2118, 132 L.Ed.2d 158 (1995). In remanding the case, the Supreme Court held that all programs imposing race-based classifications must be adjudicated under the

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[1] Each Defendant is sued in an official capacity. Frederico Peña is no longer the secretary of the DOT. Rodney E. Slater currently holds that positon. Jane Garvey is now the Acting Administrator of the FHA.

"strict scrutiny" standard. *Id.* at 227, 115 S.Ct. at 2113. "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.*

While the Court ruled on the proper standard to be applied to the case at bar, it declined to render an opinion on the underlying merits. It opted instead to "remand the case to the lower courts for further consideration in light of the principles we have announced." *Id.* In explaining its decision to remand, the Court noted that certain "unresolved questions" involving the "complex regulatory regimes implicated by the use of subcontractor compensations clauses" needed to be addressed. It submitted to the lower courts the question of "whether any of the ways in which the government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 240, 115 S.Ct. at 2119.

The prudence of remanding this case to the trial court is difficult to perceive. Both parties have stipulated to the absence of any dispute of material fact (Cross Mot. Summ. J. Tr., Dec. 20, 1996 at 29-30), and the "unresolved questions" posed by Justice O'Connor in *Adarand III* concern only issues of statutory construction relating to "the details of the complex regulatory regimes" and a number of "apparent discrepanc[ies]" the Court found in the application of the statutes and regulations involved. 515 U.S. at 238-39, 115 S.Ct. at 2118.

While it is true that the decision to require strict scrutiny "alters the playing field in some important respects," *Id.*, it is equally true that the higher courts are better equipped to decide as a matter of law whether,

under the proper interpretation, the statutes involved can be described as in furtherance of a compelling interest and narrowly tailored to meet that interest. As such, concerns of judicial efficiency and the desire to resolve disputes quickly would have favored the resolution of the remaining legal issues by the higher courts.

Following the remand, the Tenth Circuit Court of Appeals entered an order stating that, its own judgment having been vacated and, upon consideration of the Supreme Court's judgment, the cause was remanded to this court for further proceedings. Again, in light of the lack of a genuine issue as to any material fact, the rationale for the circuit court's remand to this trial court eludes me.

Be that as it may, the parties have briefed the issue presented upon remand, namely, whether the Defendants' use of the SCC is constitutional. An amici curiae brief has been filed by the Minority Business Enterprise Legal Defense and Education Fund, Inc. and the Mid-Peninsula Minority Contractors Association. Oral argument was heard.

Jurisdiction exists under 28 U.S.C. § 1331 and § 1343.

I grant Adarand's motion for summary judgment, and deny that of the Defendants. I issue an injunction enjoining the Defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program. This effectively precludes the implementation of the statutes or regulations that grant presumptive eligibility for government preference in contracting on the basis of race, i.e., the use of presumptions of social and economic disadvantage in § 8(d) of the Small Business

Act, 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, (SBA) and the use of percentage goals found in and promulgated pursuant to § 644(g) of the SBA, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) and the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. No. 102-240, 105 Stat.1914 (ISTEA.)[2] These enactments, either *per se*, or through their implementing regulations, allow presumptive eligibility for a "preferred status" in federal subcontracts based on race.

I. *Factual and Procedural Background*[3]

In 1989 the CFLHD, which is part of the DOT awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. When Mountain Gravel solicited bids from subcontractors for the guardrail portion of the contract, Adarand, a Colorado-based highway construction company, specializing in guardrail work, submitted the low bid. Gonzales Construction, owned and operated by Frankie Gonzales, also submitted a bid.

According to the prime contract, Mountain Gravel would receive additional compensation from the government if it hired subcontractors certified as small businesses controlled by "socially and economically

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[2] The Surface Transportation Assistance Act of 1982 (STAA) preceded both STURAA and ISTEA.

[3] I follow closely the synopsis of the Court in *Adarand III*, 515 U.S. at ___ - ___, 115 S.Ct. at 2102-04.

disadvantaged individuals." Whereas Gonzales is certified as such a business, Adarand is not. Despite Adarand's low bid, Mountain Gravel awarded the subcontract to Gonzales. An affidavit of Mountain Gravel's Chief Estimator states the company would have accepted Adarand's bid were it not for the additional payment received by hiring Gonzales.

Having lost the guardrail subcontract to Gonzales, Adarand filed a complaint seeking declaratory and permanent injunctive relief against DOT and other federal officials, claiming violation of its equal protection rights by the race-based presumptions inherent in the use of subcontracting compensation clauses.

The parties filed cross-motions for summary judgment. Judge Carrigan, now retired, granted the Defendants' motion. Relying on *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), he held the challenged federal program serves appropriate governmental objectives and was narrowly tailored to achieve the objectives of STAA and STURAA. *Adarand Constructors, Inc. v. Skinner (Adarand I)*, 790 F.Supp. 240, 243-45 (D.Colo.1992).

The Tenth Circuit Court of Appeals affirmed on grounds different from those relied on by Judge Carrigan. *Adarand Constructors, Inc. v. Pena* (*Adarand II*), 16 F.3d 1537, 1539 (10th Cir.1994). It held the district court mistakenly determined the challenged program was authorized by STAA and STURAA, whereas, as stipulated for the purposes of the appeal, the SCC program is authorized by § 502 of the SBA, 15 U.S.C. § 644(g). Thus, the appeals court said, the constitutionality of STAA and

STURAA was not at issue. Nevertheless, it held the analysis of the SCC program under the SBA was identical to the district court's analysis under STAA and STURAA. *Id.* at 1543.

Applying the "lenient standard, resembling intermediate scrutiny" adopted in *Fullilove*, as further developed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), to assess the constitutionality of a federal race-conscious program, the court of appeals upheld the use of SCCs. Relying on these cases, the court reasoned the federal government, acting under authority of Congress and § 5 of the Fourteenth Amendment, can legislate affirmative action programs more freely than state or local governments. *Adarand II*, 16 F.3d at 1545. Further, the appeals court rejected as without legal authority Adarand's argument that a federal agency such as the CFLHD must make specific findings of past racial discrimination to justify the SCC program. *Id.*

Whereas Judge Carrigan had found the SCC program constitutional because it was similar to that upheld in *Fullilove* and was narrowly tailored to achieve its remedial objectives, the circuit court concluded the program was constitutional because eligibility was not based solely on racial or ethnic status but on economic disadvantage. *Id.* at 1547. Further, the SCC program was " 'appropriately limited in extent and duration' " as required by *Fullilove* in that it was subject to regular " 'reassessment and reevaluation by Congress.' " *Id.* (quoting *Fullilove*, 448 U.S. at 489, 100 S.Ct. at 2780.)

The circuit court emphasized, because the SCC program did not compel contractors to subcontract with

disadvantaged business enterprises ("DBEs"), but rather induced them to do so, it could not be said to violate equal protection requirements. *Id.* Finally, it acknowledged the lesson in *Fullilove* that " '[i]t is not constitutional defect in this program that it may disappoint the expectations of nonminority firms.' " *Id.* (quoting *Fullilove*, 448 U.S. at 484, 100 S.Ct. at 2778).

The United States Supreme Court granted certiorari to examine whether the proper standard of review had been applied by the Tenth Circuit. The Court vacated the circuit court's holding and held "[f]ederal racial classifications, like those of a state, must serve a compelling governmental interest and must be narrowly tailored to further that interest." *Adarand III*, 515 U.S. at 239, 115 S.Ct. at 2118. It remanded the case for evaluation in light of its conclusion that federal affirmative action programs, such as that at issue here, are subject not to intermediate, but to strict scrutiny review. *Id.*[4]

Writing for the majority, Justice O'Connor set forth the relevant federal laws and regulations at issue, and determined that Adarand had standing to challenge and obtain relief from SCC programs. *Id.* at 204-11, 115 S.Ct. at 2102-05. The Court then reviewed its previous decisions involving the Fifth Amendment's Due Process

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[4] Composing the majority in this case were Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. Justice O'Connor wrote the Court's opinion. Justices Scalia and Thomas wrote concurring opinions. Justices Stevens, Souter, Ginsberg and Breyer dissented, each writing an opinion with the exception of Justice Breyer.

Clause[5] and the Fourteenth Amendment's Equal Protection Clause.[6] *Id.* at 213-14, 115 S.Ct. at 2106.

Tracing the Court's treatment of governmental classifications that have affected classes of people who have suffered societal discrimination, Justice O'Connor restated the principle of *Bolling v. Sharpe* 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954) that the equal protection components of the Fifth and Fourteenth Amendments are indistinguishable. *Adarand III*, 515 U.S. at 213-17, 115 S.Ct. at 2106-08. The majority emphasized it has consistently held that government racial classifications, whether created by federal or state governments, must be subjected to the "most rigid judicial scrutiny." *Id.* at 216, 115 S.Ct. at 2107 (quoting *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944)).

The Court noted it's [sic] struggle over the past twenty years to formulate the proper standard of review for affirmative action and minority assistance programs but had resolved the issue at least in part in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Adarand III*, 515 U.S. at 219-21, 115 S.Ct at 2109-10. Justice O'Connor opined the Court's previous cases had analyzed governmental racial classifications with "skepticism," "consistency," and "congruence." *Id.* at 223-24, 115 S.Ct. at 2111.

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[5] "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

[6] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

According to the majority, the Court's decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) deviated from the long-standing principle that both federal and state governments are held to the same equal protection duty when it held that "benign" racial classifications created by the federal government are subject to intermediate scrutiny. *Adarand III*, 515 U.S. at 223-26, 115 S.Ct at 2111-12. *Metro Broadcasting*, Justice O'Connor wrote, ignored the essential precept that all governmental racial classifications, federal and state, must be strictly scrutinized. *Id.* The majority overruled *Metro Broadcasting* to the extent that a standard of review less than strict scrutiny would be applied in any racial classification, whether created by federal, state or local government. *Id.* at 227-28, 115 S.Ct. at 2113.

In conclusion, Justice O'Connor announced the application of strict scrutiny to all, including federal, racial classifications, would ensure that only those which are narrowly tailored to serve a compelling governmental interest are tolerated. Finally the majority stated it wished to dispel the notion that "strict scrutiny is 'strict in theory, but fatal in fact.' " *Id.* at 237, 115 S.Ct. at 2117 (quoting *Fullilove*, 448 U.S. at 519, 100 S.Ct. at 2795) (Marshall, J., concurring in judgment). The case was remanded to the lower courts for determination of the constitutionality of the SCC under a strict scrutiny standard.

II. *Standards for Summary Judgment*

Under Federal Rule of Civil Procedure 56(c),

> [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. . . .
>
> While the movant bears the burden of showing the absence of a genuine issue of material fact, the movant need not negate the non-movant's claim but need only point to an absence of evidence to support the non-movant's claim. If the movant carries this initial burden, the non-movant may not rest upon its pleadings, but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant.

Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996) (quoting *Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir.1995)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

III. *Directives upon Remand.*

Justice O'Connor noted several issues which must be addressed in determining whether any of the ways in which the government uses subcontractor compensation clauses can survive strict scrutiny. *Adarand III*, 515 U.S. at 237-38, 115 S.Ct. at 2118.

According to the majority opinion, the circuit court, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It did not address whether the interests served by the use of subcontractor compensation clauses are compelling. *Id.* Nor, Justice O'Connor said, did the Tenth Circuit address the issue of narrow tailoring in terms of strict scrutiny cases which have asked, for example, "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Id.* (quoting *Croson*, 488 U.S. at 507, 109 S.Ct. at 729). The circuit court also did not consider "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effect it is designed to eliminate.' " *Id.* (quoting *Fullilove*, 448 U.S. at 513, 100 S.Ct. at 2792-93).

Justice O'Connor found "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses." *Id.* Whereas the SBA's 8(a) program requires individualized inquiry into the economic disadvantage of every participant, 13 C.F.R. § 124.106(a) (1996), the DOT regulations implementing STURAA § 106(c) require no such individualized inquiry by the certifying

authority, 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995).

Nor, the Court noted, are the regulations clear as to whether 8(d) subcontractors must make individualized showings or whether the race-based presumption applies to social as well as economic disadvantage. *See* 13 C.F.R. § 124.106(b) (1996) (seemingly requiring such contractors to make an individualized showing), as compared with 48 C.F.R. § 19.703(a)(2) (1995) (apparently allowing them to invoke the race-based presumption for social and economic disadvantage). *Adarand III*, 515 U.S. at 238, 115 S.Ct. at 2118.

Justice O'Connor further noted "an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs." *Id*. Regulations relating to 8(a) participants require a showing that such person's ability to compete has been impaired "as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.106(a)(1)(i) (1996). Those governing 8(d) programs merely require a showing "as compared to others in the same or similar line of business." § 124.106(b)(1). The majority directed the lower courts to consider if distinctions such as these may have relevance to the question of whether the way in which the government uses subcontractor compensation clauses can survive strict scrutiny.

IV. *The Complex Regulatory Regimes.*

In the First Amended Complaint, filed January 22, 1996, Adarand seeks, *inter alia*, a declaration that § 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand of its constitutional rights. (First Am. Compl. ¶¶ 6, 8-21, 31, and Prayer for Relief).

In brief, Adarand states it has challenged as unconstitutional "all of the statutory provisions from which [the] Defendants claim authority to award highway construction contracts in Colorado on the basis of race." (Pl.'s Reply Mem. at 1 n. 1).[7] This is somewhat broader than the Supreme Court's characterization of the issue before this court, namely "whether any of the ways in which the federal government uses subcontractor clauses can survive strict scrutiny. . . . " *Adarand III*, 515 U.S. at 238, 115 S.Ct. at 2118.

As the Court noted, this case concerns "complex regulatory regimes implicated by the use of subcontractor compensation clauses." *Id*. First, a number of provisions in the SBA, are implicated. According to the SBA, it is the policy of the United States that

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[7] Adarand's standing to raise these issues is discussed below.

> small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts. . . .

15 U.S.C. § 637(d)(1).

In order to achieve these goals, § 637(d) (the "8(d) program") requires that certain language be included in all contracts, with three limited exceptions, let by federal agencies. The required clause includes the policy statement set out above, and further states: "The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract." 15 U.S.C. § 637(d)(3)(B).

A "small business concern owned and controlled by socially and economically disadvantaged individuals" is defined as a small business concern "which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals," and "whose management and daily business operations are controlled by one or more of such individuals." 15 U.S.C. § 637(d)(3)(C)(i) and (ii). The SBA also requires the following contractual language:

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be

> disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.
>
> . . . . .
>
> Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as . . . a small business concern owned and controlled by socially and economically disadvantaged individuals. . . .

15 U.S.C. §§ 637(d)(3)(C), 637(d)(3)(E).

The finding "by the Administration" in the quoted passage refers to certification by the Small Business Administration under the 8(a) set aside program. *See* 15 U.S.C. § 637(a). Unlike the 8(d) program described above, which mandates the inclusion of the described clause in contracts between federal agencies and general contractors, the 8(a) program substantially alters the federal contracting process by allowing the Administration to act as an intermediary between a contracting agency and the end contractors who are to perform the work. *Compare* 15 U.S.C. § 637(a) with 15 U.S.C. § 637(d).

When the 8(a) program is invoked, the Administration may "enter into contracts with the United States Government and any department, agency, or officer thereof . . . to furnish articles, equipment, supplies, services, or materials . . . or to perform construction work for the Government." 15 U.S.C. § 637(a)(1)(A). The Administration will then "arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns. . . . " who have been

certified as § 8(a) program participants. 15 U.S.C. § 637(a)(1)(B).

Section 637(a)(1)-(21) and the implementing regulations at 13 C.F.R. §§ 124.100-124.113 (1996) provide an elaborate set of guidelines to be used by the Administration in deciding whether a business is eligible for the 8(a) program, including general definitions of social and economic disadvantage.[8]

Under the SBA, "socially disadvantaged" persons are those "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member [sic] of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5).

The regulations augment this definition, stating that, in the absence of evidence to the contrary, individuals claiming membership in certain racial groups, including Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans, are presumptively designated as socially disadvantaged for the purposes of the SBA. 13 C.F.R. § 124.105(b) (1996). Individuals who are not members of the designated groups, but who desire to participate in the 8(a) program must establish, "on the basis of clear and convincing evidence," that they meet a five part test in order to be certified as socially disadvantaged. 13 C.F.R. § 124.105(c) (1996).

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[8] As discussed below, these definitions are used to supplement the eligibility thresholds for § 8(d) of the SBA and the meaning of "social and economic disadvantage," as applied under the 8(d) program, is adopted by both STURAA and ISTEA.

The first part of this test is that the claimed social disadvantage "must stem from . . . color, ethnic origin, gender, physical handicap, [or] long-term residence in an environment isolated from the mainstream of American society. . . . ' " § 124.105(c)(1)(i). In addition, the regulations require that an individual not belonging to one of the specified groups prove that "he or she has personally suffered social disadvantage," that the claimed disadvantage is "rooted in treatment which he or she has experienced in American society, not in other countries," is "chronic and substantial, not fleeting or insignificant," and has "negatively impacted on his or her entry into and/or advancement in the business world." § 124.105(c)(1) (ii) to (v).

"Economically disadvantaged" individuals are defined by § 8(a) of the SBA as socially disadvantaged persons "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). As the Supreme Court recognized in *Adarand III*, the regulations provide two different standards for designation as "economically disadvantaged," depending on whether the question arises under the 8(a) program or the 8(d) mandates. 515 U.S. at 207-08, 115 S.Ct. at 2103.

Section 124.106(a) defines economic disadvantage for the purposes of the 8(a) program by comparing the individual seeking certification with "others in the same or similar line of business *who are not socially disadvantaged*. . . . " 13 C.F.R. § 124.106(a) (1996) (emphasis added). By contrast, § 124.106(b), which applies to "the

section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status," requires the Administration to compare an individual seeking designation as "economically disadvantaged" only with "others in the same line of business. . . . " 13 C.F.R. § 124.106(b) (1996).

Under both § 124.106(a) and § 124.106(b), the Administration determines economic disadvantage by examining "[t]he personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets." 13 C.F.R. § 124.106(a)(2) (1996); 13 C.F.R. § 124.106(b)(1) (1996).

However, for the purposes of the 8(d) and other programs requiring SBA's determination of disadvantaged status, the Administration is required to "apply standards to each factor that are *less restrictive* than those applied when determining economic disadvantage for the purposes of the 8(a) program." 13 C.F.R. § 124.106(b)(1) (1996) (emphasis added). According to the regulations, this approach "corresponds to the Congressional [sic] intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal [sic] procurement programs for . . . socially and economically disadvantaged individuals."[9] 13 C.F.R. § 124.106(b)(1) (1996).

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[9] The regulations limit overall participation in the 8(a) program, or the program term, to a period of nine years from the date of certification. 13 C.F.R. § 124.110 (1996). An 8(a) business concern may be "graduated from the program" when it has achieved the "targets, objectives and goals set forth in its business plan prior to the expiration of its Program Term [sic], and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) program." 13 C.F.R. § 124.208(a) (1996). In addition to graduation, an 8(a) participant can also have its program term prematurely terminated "for good cause," which includes the occurrence of any of twenty-five events listed in 13 C.F.R. § 124.209(a) (1996).

This "less restrictive" examination may be at odds with the plain language of the SBA itself, insofar as the 8(d) provisions direct prime contractors to "presume that socially and economically disadvantaged individuals include [the specified racial groups] or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(3)(C). This language, standing alone, grants the presumption of both social and economic disadvantage (and thus eligibility for programs relying on the 8(d) usage of these terms) to members of the listed minority groups without reference to their economic status, in addition to allowing those actually found to be economically disadvantaged under the requirements of § 8(a) to qualify.

As Justice O'Connor noted, a further set of regulations implementing the 8(d) program supports this reading by stating that "[i]ndividuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged." *Adarand III*, 515 U.S. at 207, 115 S.Ct. at 2103 (quoting 48 C.F.R. § 19.001 (1996)); *see also* 48 C.F.R. § 19.703(a)(2)

(1996) (allowing individuals "who certify that they are members of [the] named groups . . . [to] represent themselves as socially and economically disadvantaged").

Clearly, the SBA statutory language creating the 8(d) program is inconsistent with certain regulations governing certification of social and economic disadvantage in addition to the regulations themselves being mutually inconsistent. This leaves "some uncertainty as to whether the 8(d) subcontracting program requires an individualized showing of economic disadvantage." *Adarand III*, 515 U.S. at 207, 115 S.Ct. at 2103.

While the regulations at 13 C.F.R. 124.106(b) (1996) inquire into the actual financial condition of the applicant, the plain language set forth in § 637(d) of the SBA and the regulations at 48 C.F.R. 19.001 (1996), do not require such an inquiry in determining eligibility for the 8(d) program. This demonstrates that the framework of the SBA permits the promulgation of regulations which, like § 8(d) itself, allow a presumption of both social and economic disadvantage based entirely on membership in certain racial groups.

Under both the 8(a) and the 8(d) programs, the race-engendered presumptions of disadvantage may be rebutted if a third party comes forward with evidence that the participant in question is not, in fact, socially or economically disadvantaged. *See* 13 C.F.R. §§ 124.111(c)-(d) and 124.601-609 (1996). Adarand points out that only third parties may come forward to initiate a rebuttal of presumptive disadvantage, and that no such duty falls upon the Defendants or any other governmental entity.

The SBA further provides "[t]he President shall annually establish Government-wide [sic] goals for procurement contracts awarded to . . . small business concerns owned and controlled by socially and economically disadvantaged individuals. . . . " 15 U.S.C. § 644(g)(1). This goal "shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.*

In addition, the SBA requires each federal agency to establish goals for the participation by small business concerns owned and controlled by socially and economically disadvantaged individuals in procurement contracts of such agency. 15 U.S.C. § 644(g)(2). These goals "shall realistically reflect the potential of . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . to perform such contracts and to perform subcontracts under such contracts." *Id.*

As the Court noted in *Adarand III*, 515 U.S. at 205-07, 115 S.Ct. at 2102, the goals described in 15 U.S.C. § 644(g)(1) and (2) are in furtherance of the policy stated in 8(d)(1), that small business concerns owned and controlled by socially and economically disadvantaged individuals have the maximum opportunity to participate in the performance of contracts let by any federal agency.

The FHA's own goal as applied to its Federal Lands Highway Program (FLHP), and thus to contracts let by the CFLHD was "somewhere around 12[to] 15 percent" at times pertinent to this litigation. (Defs.' Supp'l Ex. Supp. Mot. Summ. J., Depo. James L. Robinson, CFLHD Engineer, ("Robinson Depo.") at 44, line 16.) Statements on the

record also indicate that when this goal was not met, CFLHD officials would receive a "chat from a supervisor." *Id* at 45, line 19.

In addition to the minimum 5 percent goal provided by the SBA and the 12 to 15 per cent goals adopted by the FHA and applied to the CFLHD pursuant to § 644(g) of the SBA, the contract at issue was also subject to goals included in STURAA and ISTEA, both DOT appropriations measures.

It is undisputed that the initial funding for the West Dolores project and the contract at issue was provided by the Highway Trust Fund under STURAA. ISTEA later superseded STURAA and provided the funding for change orders and supplemental agreements for the West Dolores project.

Section 106(c)(1) of STURAA requires that "not less than 10 percent" of the funds appropriated under the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. ISTEA, in § 1003(b), adopts the 10 percent goal found in STURAA. 105 Stat. 1919.

Significantly, both STURAA and ISTEA state the term "socially and economically disadvantaged individual[s]" has the meaning of such term under § 8(d) of the SBA "and relevant subcontracting regulations promulgated pursuant thereto." STURAA § 106(c)(2)(B), 101 Stat. 146; ISTEA § 1003(b)(2)(B), 105 Stat. 1919-1920. Accordingly, under STURAA and ISTEA, the race-based presumption contained in 15 U.S.C. § 637(d) applies for the purposes of determining both social and economic disadvantage,

although the somewhat contradictory regulations promulgated pursuant to the SBA also apply. Thus, business concerns owned and controlled by Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, in addition to other groups or individuals certified under the more restrictive tests provided by the SBA's 8(a) program are considered both socially and economically disadvantaged for the purposes of STURAA and ISTEA. 101 Stat. 146; 105 Stat. 1919-20; 15 U.S.C. § 637(d)(3)(C); 13 C.F.R. § 124.106(b) (1996).

The Secretary of Transportation, pursuant to the requirements in STURAA, established "minimum uniform criteria for State governments to use in certifying whether a concern qualifies" for purposes of meeting the act's goals for disadvantaged businesses. STURAA § 106(c)(4), 101 Stat. 146. These regulations require the certifying authority to presume both social and economic disadvantage (i.e., eligibility to participate) if the applicant belongs to the listed racial groups (or is a woman). 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995).[10] As with the SBA programs, third parties may

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[10] The latter regulations entitled "Guidance for making Determinations of Social and Economic Disadvantage" are illustrative of Justice Stevens' comment that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 534-35 n. 5, 100 S.Ct. at 2803 n. 5 (Stevens J. dissenting). I refer in particular to the following:

Recipients should continue the existing practice of making their own judgments about whether the individual is in fact a member of one of the presumptive groups. If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is

come forward with evidence to rebut the presumption of disadvantage for any particular business. 49 C.F.R., Subpt. D, App. C (1995).

The SCC challenged by *Adarand* in this action was developed by the FHA under the FLHP as a means to comply with the minimum 5 percent goals provided by § 644(g) of the SBA, the 12 to 15 percent goals adopted by the FHA pursuant thereto, and the 10 percent goals set forth in STURAA and ISTEA.[11] A uniform version of the SCC was established by the Administrator of the FLHP in early 1981. (Defs.' Stmt. Undisp. Mat. Facts ¶ II.A.31.)

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unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experiences [sic]. If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis. 49 C.F.R., Subpt. D, App. C (1995).

[11] The Defendants note the CFLHD has sought to meet the DBE goals established by the SBA, STURAA and ISTEA in several ways, including: 1) contract awards to small disadvantaged business as prime contractors; 2) contracts made with the SBA and set aside for 8(a) certified program participants pursuant to the SBA's 8(a) program; and 3) through subcontracting by prime contractors to small disadvantaged businesses, including such contracts under the SCC. (Defs.' Stmt. Undisp. Mat. Facts ¶ 31, n. 7.) The Defendants maintain, and Adarand does not dispute, that the challenge in this action is based only on the use of the SCC to meet the various goals. *Id.*

The SCC at issue reads:

108.01 *Subcontracting*. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency [sic]. Certification by other Government [sic] agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer [sic] has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor [sic] requests payment under this provision, the Contractor [sic] shall furnish the Engineer [sic] with acceptable evidence of the subcontractor(s) [sic] DBE certification and shall furnish one certified copy of the executed subcontract(s).

Compensation is provided to the Contractor [sic] to locate, train, utilize, assist, and develop DBE's to become fully qualified contractors in the transportation facilities construction field. The Contractor [sic] shall also provide direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. . . .

. . . . .

The Contractor [sic] will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontracted amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.

The Contractor [sic] will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

(Defs.' Mot. Summ. J., Ex. 1 at I-24, I-25.)

Mountain Gravel, the prime contractor in this case, had to hire a subcontractor certified as a DBE in order to benefit from this SCC. In addition, the terms of the SCC allowed the additional financial benefits to attach to Mountain Gravel only where more than 10 percent of the original contract amount was awarded to one or more DBEs.

As explained, DBE certification can come from one of three basic sources, all part of the statutory authority giving rise to the use of SCCs. First, a business may be granted DBE status as an ancillary benefit to meeting the requirements for certification as a participant in the SBA's

8(a) program. 15 U.S.C. § 637(a). A business so certified, while entitled to a presumption of social disadvantage if owned and controlled by individuals belonging to certain minority groups, is still required to prove actual economic disadvantage. *Id.* However, a business like Adarand, which is not owned by members of the listed racial groups is required to meet a rigid five-part test before a finding of social disadvantage can be made. 13 C.F.R. § 124.105(c) (1996).

Second, a business can be certified as a DBE under the less restrictive requirements set forth in the SBA's 8(d) provisions. 15 U.S.C. § 637(d). The statutory language enacted by Congress appears to grant a race-based presumption of both social and economic disadvantage, such that one could conceivably be certified as a DBE under the 8(d) program on the basis of race alone. *Id.* However, as noted, the regulations appear to require some showing of actual economic disadvantage – albeit under some lesser standard than required for the same finding under § 8(a). *See* 13 C.F.R. § 124.106(b) (1996).

Third, a concern can be certified by a state highway agency pursuant to the DOT regulations, which like the 8(d) SBA provisions, provide for race-based presumptions of both social and economic disadvantage. 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995).

Under the SCC at issue, "a small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government [sic] agencies . . . may be acceptable on an individual basis . . . " (Defs.' Mot. Summ. J., Ex. 1 at I-24.)

At the time of the challenged award, the CFLHD did not itself certify businesses as DBEs. Gonzales was certified as a DBE by the State of Colorado Department of Highways in 1985 pursuant to STURAA and the implementing DOT regulations. *See* 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995) (Stmt. Mat. Facts Not Disp. ¶ 36; Defs.' Stmt. Undisp. Mat. Facts, ¶ 19.) In granting Gonzales DBE certification, the State of Colorado presumed that Frankie Gonzales was both socially and economically disadvantaged. (Stmt. Mat. Facts Not in Dispute ¶ 35.)

V. *Standing.*

Adarand seeks a declaration that § 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g) and the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand of its constitutional rights. (First Am. Compl. pp 6, 8-21, 31, and Prayer for Relief).

In reviewing the issue of standing, the Supreme Court concluded Adarand has standing to seek forward looking relief against any future use of subcontractor compensation clauses. *Adarand III*, 515 U.S. at 211-12, 115 S.Ct. at 2105. Based on the deposition testimony of Adarand's general manager to the effect that the company bid on every guardrail project in Colorado, the Court found Adarand had "made an adequate showing that sometime in the relatively near future it will bid on

another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Id.*

The Court noted it is not necessary for the aggrieved party to allege that it " 'would have obtained the benefit but for the barrier in order to establish standing.' " *Id.* (quoting *General Contractors v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)). This renders any dispute of fact as to the reason why Mountain Gravel awarded the contract to Gonzales rather than to Adarand neither material to, nor preclusive of, the entry of summary judgment.

On the issue of standing, the Defendants assert Plaintiff's description of the alleged components of the race-based program encompasses § 8(a) of the SBA, 15 U.S.C. § 637(a), and the DOT "federal aid" grants to state and local governments funded, in part, by STURAA and ISTEA. These allegations, the Defendants argue, are beyond the scope of this litigation because Adarand has limited its constitutional challenge to highway construction contracting in Colorado. (Am. Compl., Prayer for Relief, pp 1, 2.) Further, the Defendants state, Adarand has not alleged nor offered any evidence that it could have bid on any DOT federal aid or 8(a) projects in Colorado. Accordingly, the Defendants maintain Adarand lacks standing to challenge 15 U.S.C. § 637(a) and its implementing regulations nor any aspect of STURAA, ISTEA, or 49 C.F.R. Part 23 (1995) that goes beyond the SCC.

In reply, Adarand states its challenge is not solely to the SCC but to all of the statutory provisions from which

the Defendants claim authority to award highway construction contracts in Colorado on the basis of race. It maintains each of the statutes and regulations it cites in the Amended Complaint are at issue. STURAA and ISTEA provided the funding for the West Dolores Project on which Adarand was denied the guardrail subcontract; both statutes incorporate the presumption for minority groups listed in 15 U.S.C. § 637(d) and other groups listed in 13 C.F.R. § 124.105(b) (1996).

The SBA, 15 U.S.C. § 637(d)(1), (2), and (3), states that DBEs "shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency," and all such contracts shall include certain language, including the statement that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged" Further, the SBA, 15 U.S.C. § 644(g) states each federal agency shall set goals for DBE participation that will represent "the maximum practicable opportunity."

Adarand notes the regulations implementing the SBA are found at 13 C.F.R. § 124.101 *et seq.* (1996), 48 C.F.R. § 19.000 (1995) and 48 C.F.R. § 52.219-8 (1996). Section 124.101 states that to participate in the 8(a) program, an individual must meet all the requirements set forth in § 124.102 through § 124.109. 13 C.F.R. § 124.101 (1996). Section 124.105 defines "social disadvantage" and states that members of certain minority groups are presumed to be "socially and economically disadvantaged." 13 C.F.R. § 124.105 (1996).

Adarand points out 48 C.F.R. § 19.001 (1996) is the definition section, containing a definition of small, disadvantaged business concern, while § 19.703 states that to be eligible as a subcontractor under the program, a concern must be a small business or a DBE and that "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans" are presumed to be DBEs. Further, 48 C.F.R. § 52.219-8 (1996) has the same presumption as 15 U.S.C. § 637(d).

Finally, Adarand asserts, 49 C.F.R. Part 23 (1995) implementing STURAA and ISTEA, 49 C.F.R. § 23.53 (1995) sets forth the requirements to qualify as a DBE (referred to as "MBE"), and § 23.62 presumes certain minority groups to be both "socially and economically disadvantaged" and forbids the State of Colorado from investigating either the social or economic status of members of those groups.[12]

Adarand states these are the statutory provisions the Defendants claim gave them authority to award contracts in the Colorado highway industry based on race. Because this lawsuit implicates all the aforesaid statutes and regulations, Adarand argues it has standing to challenge each of these statutory provisions. The SCC, Adarand declares, is one method the Defendants use to implement the race-based statutes at issue, and therefore each of the statutes is unconstitutional as applied in this case.

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[12] The State of Colorado apparently used these regulations in certifying Gonzales Construction, which was awarded the guardrail subcontract on the West Dolores Project.

The Supreme Court concluded Adarand has standing to seek forward-looking relief in the form of declaratory and injunctive relief against any future use of subcontractor compensation clauses. *Adarand III*, at 211-12, 115 S.Ct. at 2105. The Court noted the facts of the case "implicate a complex scheme of federal statutes and regulations to which we now turn." *Id.* at 205, 115 S.Ct. at 2102. It then discussed the relevant statutes and regulations as set out above.

In concluding the majority opinion, Justice O'Connor noted "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses." *Id.* at 238, 115 S.Ct. at 2118. The Court then reiterated the various statutes and regulations at issue. It has therefore determined that Adarand has standing to challenge the race-based program involving use of SCCs, and, by implication, all those statutes and regulations forming the basis of such program. This includes the race-based presumptions of disadvantage that form the basis for DBE certification in most circumstances, as well as the SBA, STURAA, and ISTEA provisions that establish percentage "goals" for federal contract participation by concerns presumed eligible.

Adarand does not challenge the SBA's 8(a) program, 15 U.S.C. § 637(a), in and of itself, although the FLHP uses that program to meet the DBE participation goals established by § 644(g) of the SBA and § 106(c) of STURAA. Nor do I believe Adarand would have standing to do so, since the 8(a) program does not involve the use of SCCs. Nevertheless the 8(a) program, 15 U.S.C. § 637(a), and regulations promulgated thereunder are

implicated to the extent that the definitions of "social and economic disadvantage" contained therein are used to supplement the definition of those terms under the SBA's § 8(d) program and implementing regulations.

VI. *Strict Scrutiny.*

In remanding this case to the lower courts, the Court directed them to determine "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Adarand III*, 515 U.S. at 238, 115 S.Ct. at 2118.

"[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws [under the Fifth or Fourteenth amendment] has not been infringed." *Adarand III*, at 227, 115 S.Ct. at 2112. "All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.*

The strict scrutiny test involves two questions. The first is whether the interest cited by the government as its reason for injecting the consideration of race into the application of law is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the government is concerned. The second is whether the government has narrowly tailored its use of race, so that race-based classifications are applied only to the extent absolutely required to reach the proffered interest.

A "compelling" interest is required "because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic. . . . " *Fullilove*, 448 U.S. at 533-535, 100 S.Ct. at 2803-04 (Stevens, J., dissenting). The use of race must be "narrowly tailored" to the achievement of that interest because racial preferences create both a benefit and a burden, and when the burden touches "upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299, 98 S.Ct. 2733, 2753, 57 L.Ed.2d 750 (1978) (opinion of Powell, J).

The strict scrutiny test is thus a recognition that while classifications based on race may be appropriate in certain limited legislative endeavors, such enactments must be carefully justified and meticulously applied so that race is determinative of the outcome in only the very narrow circumstances to which it is truly relevant. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.) (" 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees' ") (quoting *Fullilove*, 448 U.S. at 491, 100 S.Ct. at 2781).

A. *Compelling Governmental Interest.*

Compelling interest is the linchpin of constitutionality under strict scrutiny. The narrow tailoring requirement comes into play only when the governmental action under review is shown to be supported by such interest. Justice O'Connor noted "[t]he Court of Appeals did not decide the question of whether the interests served by the use of subcontractor compensation clauses are properly described as 'compelling.' " *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2118. In remanding the case, however, the Court did not give any meaning to the phrase "compelling interest," either by a definition or by illustration.

In view of my conclusion that the SCC program is not narrowly tailored so as to pass strict scrutiny muster, the following determination concerning compelling governmental interest may be regarded as *obiter dicta*. Nevertheless, I consider the discussion of compelling interest to be important, particularly in light of the lacuna left by the Court on the subject when it remanded the case.

There appears to be only one compelling interest recognized by the Supreme Court to justify racial classifications, namely remedying past wrongs. *See Croson*, 488 U.S. at 493, 109 S.Ct. at 722 (plurality opinion) ("[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). However, " '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.' " *Id.* at 497, 109 S.Ct. at 724 (quoting *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848). Further, consideration of race or

ethnicity by a university for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.1996) (citing Powell J.'s opinion in *Bakke*, noting that, although it was not binding, no case since has accepted diversity as a compelling state interest under a strict scrutiny analysis).

Adarand argues the Defendants have not shown a compelling governmental interest in the use of race to award federal contracts, asserting that they admit there has been no previous discrimination by them on the basis of race in awarding of federal highway construction contracts in Colorado. Relying on *Croson's* requirement that there must be specific findings of past state-sponsored discrimination before adopting a race-based remedy, Adarand maintains Congress has adopted such a remedy in the absence of any history of state-sponsored discrimination.

Adarand further argues the evidence proffered by the Defendants to support the adoption by Congress of the race-based program reveals at most two isolated incidents of discrimination. Moreover, Adarand states the officials who managed the federal government highway construction program in the states that comprise the CFLHD testified they knew of no studies or evidence that showed discrimination in the highway construction industry in Colorado.

Citing *Croson*, 488 U.S. at 497, 109 S.Ct. at 723-24, and *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848, Adarand claims there must be particularized findings that the federal government has discriminated on the basis of race in the

awarding of federal highway construction contracts in Colorado. According to Adarand, the Defendants have not presented any particularized findings of discrimination by federal actors in the highway construction industry.

The Defendants argue Adarand has misconstrued *Croson* and *Wygant* and failed to recognize Congress' unique role as the national legislature. They state Adarand's reliance on *Croson* and *Wygant* is misplaced as it fails to recognize the fundamental differences between the national legislature, which authorized the programs at issue here, and the state and local bodies which promulgated the programs at issue in those cases.

According to the Defendants, Congress has the authority and obligation to address the nationwide problem of discrimination against DBEs in the construction industry with national legislation. While *Adarand III* clarified that affirmative action programs enacted by Congress are subject to strict scrutiny, the Defendants contend the Court did not question Congress' authority under § 5 of the Fourteenth Amendment, the enforcement clauses of the Thirteenth and Fifteenth Amendments, the Commerce Clause or Spending Power, to impose broad measures for remedying discrimination that impacts victims nationwide.

The Defendants maintain the Court has consistently distinguished the broad constitutional authority given Congress to remedy discrimination from the limited power of state and local governments. "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and

their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an *explicit* constraint on state power, and the states must undertake any remedial efforts in accordance with that provision." *Croson*, 488 U.S. at 490, 109 S.Ct. at 720 (emphasis in original).

Since Congress' scope of authority differs from that of states and local governments, the Defendants argue, the evidence required to demonstrate a compelling governmental interest to exercise its authority will likewise be different. It is the Defendants' position that Congress is not required to make the specific detailed analysis set forth in *Croson* to demonstrate a compelling governmental interest for Congress' action under a strict scrutiny standard of review.

Adarand responds that all of the arguments made by the Defendants that Congress has unique powers to remedy nationwide discrimination were already rejected by the Supreme Court in *Adarand III* ("The Court's concept of 'congruency' assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical differences between federal and state or local decision makers." *Adarand III*, 515 U.S. at 249, 115 S.Ct. at 2123 (Stevens, J. dissenting)).

Moreover, Adarand states the dissents filed in *Adarand III* reflect the majority opinion rejected the argument that *Fullilove* controls the decision of this court. ("The statutory scheme must be treated as constitutional

if *Fullilove v. Klutznick* is applied." *Id.* at 265, 115 S.Ct. at 2131 (Souter J., dissenting.)). Finally, Adarand relies on the majority's remark that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling," *Adarand III*, 515 U.S. at 235, 115 S.Ct. at 2117. Thus, states Adarand, the strict scrutiny standard of review required of Congress is the same as that required of state or local governments.

The Defendants reply there is no dispute that congressionally-enacted affirmative action programs are subject to strict scrutiny. However, they state, the issue is whether congressional actions should be assessed as if Congress were limited to the same powers and jurisdictional scope as a local government entity, as Adarand argues. It is the Defendants' position that Congress, unlike state and local governments, legislates on a nationwide basis that must be recognized by this court. This, the Defendants maintain, is not inconsistent with the strict scrutiny standard, but is rather a factor be taken into account in applying it.

The diametric arguments of the parties concerning what constitutes a compelling governmental interest for Congress and the evidence required to establish such interest are not surprising. They reflect the majority's failure in *Adarand III* to define the parameters of Congress' powers under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

While Justice O'Connor unified state and federal race-conscious remedies under one analytical standard,

her opinion failed to define the parameters of Congress' Section 5 powers. Noting that various members of the Court have taken different views of Congress' Section 5 powers, Justice O'Connor stated "[w]e need not, and do not, address these differences today." *Adarand III*, 515 U.S. at 231, 115 S.Ct. at 2114. Not surprisingly, Justice O'Connor side-stepped this issue of Congress' acknowledged unique Section 5 powers, since addressing it would have opened a Pandora's box that would have significantly weakened the notion of congruence.

Later in the same paragraph, however, the majority stated that "Justice Stevens' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject . . . is incorrect." *Id.* Thus, it appears that Justice O'Connor's assertion in Croson, that Congress has the ability under Section 5 to recognize and address racial discrimination, has been left undisturbed.

Given the uncertainty as to the extent to which courts should defer to Congress' Section 5 authority, I nevertheless find no support for Adarand's contention that the Defendants' use of the SCC in Colorado will pass constitutional muster only if Congress made particularized findings of discrimination in the highway industry in Colorado. Adarand's reliance on *Croson* in this regard is misplaced. There, Justice O'Connor noted

> other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of the discretion in the choice of remedies may vary with the nature and authority of the governmental body."

Croson, 488 U.S. at 489, 109 S.Ct. at 719 (quoting *Fullilove*, 448 U.S. at 515-16, n. 14, 100 S.Ct. at 2794, n. 14 (Powell, J., concurring)). Further, Justice O'Connor stated: "The city [of Richmond] is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action." *Croson*, 488 U.S. at 491, 109 S.Ct. at 720.

In *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), the Court recognized Congress' authority to legislate nationwide remedies to nationwide problems. There, the State of Arizona argued that application of a congressional ban on the use of literacy tests nationwide was improper because the racial discrimination Congress was addressing arose elsewhere in the country. *Id.* at 233, 91 S.Ct. at 319. The Court held unanimously that Congress was not required to make independent findings that circumstances in a particular state met with Congress' assessment of a national problem before federal law could be applied to that state. *Id.*

> In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is – a serious national dilemma that touches every corner of our land. In this legislation Congress had recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problem of racial discrimination is to deal with nationwide discrimination with nationwide legislation.

Id. at 133-34, 91 S.Ct. at 269 (citation omitted).

The amici brief, supporting the Defendants, cites *Croson* to the effect that "Congress, unlike any State . . . has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." 488 U.S. at 490, 109 S.Ct. at 720. This includes "the power to define situations which [it] determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* While this idea is consistent with the authority recognized in *Oregon v. Mitchell*, it may not prove dispositive regarding the use of racial classifications challenged here. Indeed, a fundamental distinction is being lost.

The congressional enactment at issue in *Mitchell* represented a clear example of a "prophylactic rule." It was a ban, a protective barrier designed to prevent a racial harm, namely the use of literacy tests to exclude African Americans from voting at the polls. The SCC, however, is more reparational than prophylactic in nature. The contract clause here seeks to overcome racial barriers, not by prohibiting them at their source, but by using financial incentives to encourage prime contractors to pass over low bidding subcontractor firms not owned by members of certain minority groups. Enforcing the right to vote of a member of a minority group does not require, *ipso facto*, the denial of that same right to anyone else.

Regardless, nothing in *Adarand III* or any other Supreme Court decision persuades me that in subjecting a statutory or regulatory scheme created by Congress to strict scrutiny, one is to ignore Congress' ability to legislate nationwide to address nationwide problems thus placing it on the same constitutional plane as a city council. To the contrary, Justice O'Connor's majority

opinion states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2117.

There is also little support for Adarand's argument that the Defendants must show that the federal government itself has discriminated against minority highway construction firms. Neither *Adarand III* nor *Croson* require such showing. In *Croson*, the Court recognized that "if the city could show that it had essentially become a 'passive participant' [by providing funding] in a system of racial exclusion practiced by elements of the local construction industry, . . . the city could take affirmative steps to dismantle such a system." 488 U.S. at 492, 109 S.Ct. at 721 (plurality opinion).

I conclude the requisite particularized findings of discrimination to support a compelling governmental interest for Congress' action in implementing the SCCs under a strict scrutiny standard of review would include findings of discriminatory barriers facing DBEs in federal construction contracting nationwide, rather than in a single state, whether such barriers were as a result of intentional acts of the federal government or "passive complicity in the acts of discrimination by the private sector." *Croson*, 488 U.S. at 519, 109 S.Ct. at 735 (Kennedy, J. concurring in part). Such a standard, while acknowledging the Court's requirement that there be findings of discrimination in the specific industry where alleged discrimination is sought to be remedied, *see Croson*, 488 U.S. at 497-99, 109 S.Ct. at 724, takes into account Congress'

responsibility to address nation-wide problems with nation-wide legislation.

The recognition that Congress' unique role as a national legislature allows it to look at the whole of the United States for situations that may generate a compelling governmental interest in applying race-based remedies does not end the inquiry. Even in looking at this broader picture, Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications.

The parties are in substantial disagreement as to the evidence Congress must provide before an interest becomes compelling enough to allow the consideration of race to be codified into a federal enactment. The Defendants attach Appendix I to their memorandum in support of their motion for summary judgment. This, they submit, reflects evidence of discrimination by private parties, state governments and the federal government in the construction industry. The amici supplement this evidence with additional evidence presented in an appendix to their brief.

The Defendants contend the evidence demonstrates the existence of a wide variety of active and passive discrimination by public and private parties against minority businesses in construction contracting. Congress, they argue, enacted the SCC to serve the compelling governmental interest of remedying the effects of these types of discrimination.

Adarand claims the evidence submitted is of "[s]ocietal discrimination, without more," *Croson*, 488 U.S. at 497,

109 S.Ct. at 724, as such, is "an inadequate basis for race-conscious classifications," *id.*, and does not constitute the requisite particularized findings in the specific industry where the alleged discrimination is sought to be remedied, *id.* at 499, 109 S.Ct. at 724-25. According to Adarand, the evidence set forth in Appendix I is nothing more than iteration of statements by representatives who were sponsoring legislation and cannot be described as evidence of discrimination showing a compelling government interest. *See id.* at 500, 109 S.Ct. at 725. Nor, Adarand argues, is there any evidence of discrimination against all the groups Congress presumes to be "socially and economically disadvantaged" in 15 U.S.C. § 637(d)(3)(C) and 13 C.F.R. § 124.105(b) (1996).

Appendix I recounts the relevant legislative history of the Small Business Administration concerned with developing small businesses, including those owned by socially and economically disadvantaged individuals and providing them with opportunities to participate in the economy, including the construction industry. Although some of the quotations in the appendix are by Senators or Congressmen who sponsored the bills, the Defendants submit this does not diminish the fact that Congress reasonably and correctly believed that the evidence of discrimination presented was sufficient to require corrective measures.

I agree with the Defendants in this regard. There is a fundamental difference between the record of congressional hearings, including the statements by members of Congress, submitted with the Defendants' brief, and the "highly conclusionary statement of a proponent" of the plan challenged in *Croson*. 488 U.S. at 500, 109 S.Ct. at

725. Justice O'Connor's opinion in *Croson* did not dispute Congress' ability to make such findings, nor the validity of such findings as applied to acts of *Congress*. *Id.* at 504, 109 S.Ct. at 727. Rather, the majority noted that state or *local* government entities cannot blindly rely on nationwide findings made by Congress as the basis for local race-conscious relief. *Id.* It does not follow, however, that Congress itself, when legislating for the benefit of the entire nation, cannot rely on its own hearings insofar as they establish a nationwide harm.

The limitation with respect to states and local governments set out in Croson is a recognition by the Court that state and local agencies must "also establish the presence of discrimination in their own bailiwicks . . . " *Id.* I conclude Congress may recognize a nation-wide evil, and act accordingly, provided the chosen remedy is narrowly tailored so as to preclude the application of race-conscious measures where it is not warranted.

Notably, in *Croson*, Justice O'Connor found that Congress had "explicitly recognized that the scope of the problem would vary from market area to market area," by including a waiver provision in the measures challenged in *Fullilove*. *Croson*, 488 U.S. at 504, 109 S.Ct. at 727. Justice O'Connor further observed that in making such findings, Congress "was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination." *Id.*

In sum, the congressional statements contested by Adarand are different in both character and authority

from those of the councilman in *Croson*. The record establishes that the statements by members of Congress were made after exercising the significant and well-recognized fact finding authority vested in that body. They were not the passing comments of a single legislator based on personal experience or popular perception. This, combined with Congress' constitutionally imposed role as the guardian against racial discrimination, leads me to attribute significantly more weight to the evidence in the Defendants' Appendix I than to that brushed aside in *Croson*.

I agree with Adarand that "blind judicial deference to legislative or executive pronouncements" is inappropriate in equal protection analysis. *See Croson*, 488 U.S. at 500-501, 109 S.Ct. at 725-726. However, while it would be improper to accept Congress' stated purpose with a nudge and a wink, it is not beyond the bounds of reason to examine the materials at Congress' disposal and recognize that Congress could have concluded legitimately that discriminatory racial barriers exist. A brief survey of the evidence submitted is instructive.

Appendix I states that, since the enactment of the SBA in 1978, Congress has often reexamined the issue of disadvantage in federal contracting caused by racial discrimination and found such disadvantage to continue. The appendix cites various hearings between 1978 and 1988 evidencing continuing difficulty experienced by individuals suffering from social and economic disadvantage in establishing small businesses after years of discrimination. (Defs.' Mem. Supp. Summ. J., App. I at 3-4.)

In 1988, Congress passed a substantial revision of the 8(a) program, 15 U.S.C. § 637(a), reaffirming its commitment to the elimination of discriminatory barriers faced by small businesses owned by disadvantaged individuals after a finding that discrimination and the effects of past discrimination continued to hinder their development. (*Id.* at 5-6.) The Defendants cite various congressional hearings between 1988 and the present in which Congress has received annual reports from the SBA revealing continued barriers for disadvantaged businesses in contracting and a continued need for remedial programs to address disparities between minority and non-minority businesses. (*Id.* at 6-8.)

Next, the appendix reflects after Congress enacted § 105(f) of STAA in 1982, establishing a 10 percent nationwide goal for subcontracting opportunities on federally assisted DOT mass transit and highway construction projects, it reauthorized the DOT DBE program in § 106(c) of STURAA. (*Id.* at 8-9.) The Senate Report accompanying the bill noted the committee had considered extensive testimony and evidence on the bill's DBE provision and concluded that this provision was necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industries. The report stated, despite progress, barriers remained "preventing minorities and women from successfully competing in the industry." (*Id.* at 9 (quoting S.Rep. No. 4, 100th Cong., 1st Sess. 11 (1987)).)

The DOT DBE provision was again reviewed by Congress and reauthorized in 1991 in ISTEA. (*Id.* at 8-9). That

authorization expires at the end of fiscal year 1997. Congress continues to hold hearings concerning barriers to DBE entry in the construction industry and has determined continuing remedial efforts are necessary. (*Id.* at 9-10.) The appendix also cites annual reports compiled by the Department of Commerce's Minority Business Development Agency bearing out Congress' continuing concerns over the difficulties DBEs have in securing federal procurement contracts. (*Id.* at 10-11.)

Attached to the amici brief are additional materials containing a non-exhaustive list of congressional hearings and reports on discrimination against disadvantaged businesses by private parties and various government agencies. (Mem. P. & A. Amici Curiae, App. at 1-5.) The appendix to the amici brief also refers to the "disparity studies" which have been conducted following *Croson* in almost every major city in the nation comparing actual utilization of minority owned businesses with availability levels, as required in that case. (*Id.* at 5-11.) The studies show a serious pattern of discrimination across all regions, including Denver, Colorado, and across a wide range of industries. (*Id.* at 5-8.) Finally, this appendix cites recent academic findings confirming disparate treatment of minority-owned businesses by commercial lenders. (*Id.* at 12-13.)

I am unpersuaded by Adarand's argument that the vast body of evidence before Congress as it considered the challenged enactments, and the numerous studies compiled more recently represent "[s]ocietal discrimination, without more." *See Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848. The record and chronological listing of hearings detailed in the amici appendix, reveal that Congress had

a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority business. Some of the most notable were "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *See Fullilove*, 448 U.S. at 467, 100 S.Ct. at 2769 (plurality opinion) (quoting U.S. Commission on Civil Rights, "Minorities and Women as Government Contractors," 16-28, 86-88 (1975)).

The holding in *Wygant* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," 476 U.S. at 276, 106 S.Ct. at 1848, must be seen in context. *Wygant* concerned the validity of a racial preference protecting minority school teachers from layoff. *Id.* at 272, 106 S.Ct. at 1845-46. The preferences were created with the goal of remedying societal wide discrimination by providing "role-models" for minority schoolchildren. *Id.* Significantly, the only basis espoused by the defending school board for creating such a preference was societal discrimination itself. The Court rightly held that such a broad and categorical harm as "societal discrimination" could not, standing alone, create a compelling interest in imposing racial classifications.

In the circumstances of the instant case, however, Congress was not looking only to general, societal discrimination as the basis for the challenged programs. The evidence demonstrates that § 644(g) of the SBA and

§ 106(c) of STURAA are not based on the effects of such amorphous discrimination, but constitute a considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting.

Adarand contends much of the evidence submitted consists of "after action studies," that were not before Congress when it enacted the challenged measures. Such studies, it claims, are not sufficient to prove Congress had a compelling governmental interest before it proceeded to implement race-based measures. *See Shaw v. Hunt*, ___ U.S. ___, ___, 116 S.Ct. 1894, 1903, 135 L.Ed.2d 207 (1996) (holding "the institution that makes the racial distinction must have had 'a strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.' " (emphasis by the Court) (citing *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1848-49)).

I need not pass on the question of whether "after action" studies, standing alone, might ever present or document a pattern of long standing discrimination sufficient to create a compelling governmental interest in its eradication. I find, on the record before me, Congress had sufficient evidence, at the time these measures were enacted, to determine reasonably and intelligently that discriminatory barriers existed in federal contracting.

Unlike *Shaw*, this is not an instance where the legislature in question failed to consider "the historical events and social-science data that the [proffered] reports recount, beyond what individual members may have recalled from personal experience." *Shaw*, ___ U.S. at ___, 116 S.Ct. at 1903. To the contrary, Congress had ample

evidence from which to base its decision to adopt race-conscious relief.

To the extent that "after study" evidence exists, I need not ignore it. Indeed, the Tenth Circuit has held that post-enactment evidence may be properly considered along with pre-enactment evidence when performing strict scrutiny analysis. *See Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir.1994); *accord, Contractors Association v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir.1993) (holding it especially appropriate to consider post-enactment evidence where the principal relief sought was an injunction).

The party defending remedial legislation bears the initial burden of production to show the program is supported by a "strong basis in evidence." *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1849. However, the ultimate burden rests on the challenger "to demonstrate unconstitutionality of an affirmative-action program."[13] *Id.* at 277-78, 106 S.Ct. at 1849. I conclude Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a "compelling governmental interest." The issue remains whether the statutes and regulations are narrowly tailored to serve such interest.

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[13] The issue of the burden of proof is unclear. In *Plyler v. Doe*, the Court held: "With respect to such classifications [that disadvantage a 'suspect class' or impinge on the exercise of a 'fundamental right'], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." 457 U.S. 202, 217, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982).

B. *Narrow Tailoring.*

Under the strict scrutiny test, the use of race to award federal contracts must be narrowly tailored to serve a compelling interest. As mentioned, it is unclear whether Adarand has the burden of showing that the statutory and regulatory scheme is not narrowly tailored to serve a compelling governmental interest, as suggested in *Wygant*, or if the Defendants have the burden of showing that it is, as stated in *Plyler*.

In *Concrete Works*, the Tenth Circuit concluded the governmental entity must present evidence from which the court can conclude that the entity had a "firm basis for concluding that remedial action was appropriate." 36 F.3d at 1522. However, the challenger bears the ultimate burden of showing that the "evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted . . . was not sufficiently 'narrowly tailored.' " *Id.* at 1522-23 (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. at 1857 (O'Connor, J., concurring in part and concurring in the judgment)).

I note, after the majority in *Croson* found no compelling governmental interest had been established in that case, it observed it was "almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." 488 U.S. at 507, 109 S.Ct. at 729. This language logically suggests, in the context of a program professing to remedy discriminatory barriers in federal contracting, the better identified those barriers are, the more likely it will be for a court to find the

measures enacted to eliminate those barriers are narrowly tailored.

I have concluded Congress need not make state-to-state nor city-to-city findings of discrimination before it can find a compelling interest in eliminating documented discriminatory barriers. The lack of such localized findings, however, necessarily requires that Congress exercise particular care in ensuring that its programs responding to such barriers are narrowly tailored.

The Court in remanding this case offered little guidance as to how a race-based remedial approach can be narrowly tailored, asserting only that the lower courts were to determine whether the SCC program "satisfies the 'narrow tailoring test' [the] Court has set out in previous cases," *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2117. I conclude it does not.

In *United States v. Paradise*, the Court mentioned five factors which may be relevant to the determination of whether an affirmative action remedy is narrowly drawn to achieve its goal: "(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority group members in the relevant population or workforce; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties." 480 U.S. 149, 187, 107 S.Ct. 1053, 1074-75, 94 L.Ed.2d 203 (1987).

In remanding the instant case, the majority alluded to related considerations to be confronted upon remand, namely, "whether there was 'any consideration of the use

of race-neutral means to increase minority business participation' in government contracting," *Adarand III*, 515 U.S. at 237-38, 115 S.Ct. at 2118 (quoting *Croson*, 488 U.S. at 507, 109 S.Ct. at 729), and "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effect it is designed to eliminate,' " *id.* (quoting *Fullilove*, 448 U.S. at 513, 100 S.Ct. at 2792-93). Justice O'Connor's observation that "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses," also relates to the issue of narrow tailoring.

The subject SCCs were not themselves created by any act of Congress. Rather, they were instituted by the CFLHD as one means by which to comply with the congressional requirements in the SBA, STURAA, and ISTEA. As such, both the SCCs themselves and the authority under which they arise must be examined in determining whether the SCC program is a narrowly tailored measure that furthers the government's proffered interest of reducing discriminatory barriers in federal contracting.

Adarand charges the Defendants with misdirecting the attention of this court from the federal statutes serving as the basis and authority for the use of SCCs to the narrower scope of the SCCs themselves. It argues both the SCCs and the provisions in the SBA, STURAA, and ISTEA that cause and authorize their use are not narrowly tailored and do not survive strict scrutiny. I agree with Adarand that the Defendants focus to a greater extent on the SCCs themselves than on the larger picture presented by the congressional enactments.

Specifically, the Defendants argue that in *Fullilove*, the Court upheld the constitutionality of a program that required 10 percent of each contract to be set aside for DBEs. The Defendants assert the SCCs in this case are less restrictive in that they are optional and contain no goals, quotas, or set-asides. Moreover, under the SCC, prime contractors are free to accept bid proposals from any subcontractor, regardless of race or ethnicity. Thus, the Defendants suggest, since the SCCs are less restrictive than the program upheld in *Fullilove*, they should be upheld by this court. Finally, they argue, the majority in *Adarand III* specifically declined to overrule *Fullilove's* "most searching examination" standard, applied when the Court found the arguably less tailored measures in the Public Works Employment Act to be constitutional.

The attempted comparison with *Fullilove* is of limited value in the analysis of the SCCs and the statutes from which they originate. Justice O'Connor stated specifically that, "to the extent (if any) that *Fullilove* held federal racial classifications to be subjected to a less rigorous standard, it is no longer controlling." *Adarand III*, 515 U.S. at 235, 115 S.Ct. at 2117. The dissents of Justices Stevens and Souter also suggest the majority rejected an argument that *Fullilove* controls the analysis here.[14]

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[14] Justice Stevens wrote: "[O]ur obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove*. If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution . . . the Court endorses today . . . it must follow . . . that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed." *Adarand*, 515 U.S. at 264, 115 S.Ct. at 2130 (Stevens, J., dissenting). Justice Souter stated succintly "[t]he statutory scheme must be treated as constitutional if *Fullilove v. Klutznick* . . . is applied." *Id.* at 265, 115 S.Ct. at 2131 (Souter, J., dissenting).

Although the Defendants are correct that the standard applied in *Fullilove* upheld the provisions in the Public Works Employment Act at issue in that case, the majority in *Adarand III* stated it "need not decide whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it." 515 U.S. at 235, 115 S.Ct. at 2117. Because the Court expressly declined to answer this question, I view with caution any comparison between the measures upheld in *Fullilove* and those at issue here.

Adarand contends the SCCs and the relevant statutes and regulations, are not narrowly tailored because the SCC program is not optional. It contends Congress has clearly mandated that its agencies award a certain percentage of federal contracts to groups certified under the race-based presumptions. Citing extensively from the relevant statutes and regulations, Adarand asserts their language demonstrates the use of race-based preferences is mandatory. For example, § 637(d) of the SBA states "[t]he contractor *shall presume* that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . . " 15 U.S.C. § 637(d)(3)(c) (emphasis added). Section 644(g) of the SBA states: "The President *shall annually establish Government-wide goals* for procurement contracts. . . . The Government-wide goal

. . . *shall be established* . . . at not less than 5 percent. . . . " 15 U.S.C. § 644(g) (emphasis added).

Both STURAA and ISTEA provide "not less than 10 percent of the amounts authorized . . . *shall be expended* with small disadvantaged concerns. . . . " STURAA, § 106(c), P.L. 100-17, ISTEA, § 1003(b), P.L. 102-240 (emphasis added). If the CFLHD fails to meet the goals established by and pursuant to the statutes, the Division Engineer "receives a chat from his supervisor." (Robinson. Dep. at 45, lines 6-20).

Adarand points out the SCCs themselves must be included in every contract let by the CFLHD, except those let under the explicit set-asides created by the SBA's 8(a) program. It contends the extra financial "bonus"- incentives provided by the SCC causes prime contractors like Mountain Gravel to use DBEs instead of taking lower bids from non-DBE contractors.

The Defendants strenuously oppose Adarand's characterization of the payments authorized by the SCCs as a "bonus" paid to prime contractors for discriminating in favor of DBEs. They claim the SCCs are "compensation" by their very terms, and are designed to compensate prime contractors for the additional sums they may have to expend as a result of hiring DBEs.

Drawing all inferences from the record in the light most favorable to the Defendants, I find in certain circumstances, including those before me, the SCC payments do in fact serve as a "bonus." The SCC states "[c]ompensation is provided to the Contractor to locate, train, utilize, assist, and develop DBE's to become fully qualified in the transportation facilities construction

field." (Pl.'s Mot. Summ. J., Ex. A at I-25.) Further, "[t]he Contractor shall maintain records documenting these activities and shall make them available for Government review upon request."[15] *Id.* There is no requirement that a prime contractor expend any funds for the purpose of locating, training etc. Nor is there any provision for adjustment of the amount awarded to a prime contractor if utilization of a particular DBE involves no such extra expenditure.

The SCC requires the contractor to furnish a certified copy of records supporting final amounts paid to or on behalf of DBE subcontractors. However, this phrase cannot be read as requiring documented "extra" expenditures to support DBEs before the prime contractor can be paid under the SCC. Rather, it seems designed to document the contract amount, or money paid to the subcontractor under its bid, probably for the purposes of calculating the amount of compensation the prime contractor will be paid under the SCC. Clearly, the SCC awards additional payment, even in the absence of any additional cost incurred by the prime contractor with regard to its subcontracting to a DBE.

Here, the record indicates retaining Gonzales, a DBE, did not impose any additional cost upon Mountain Gravel. To the extent an SCC payment acts as a gratuity for a prime contractor who engages a DBE, it cannot be said to be narrowly tailored to the government's interest

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[15] The Defendants do not dispute that the CFLHD has never requested nor reviewed the reports required of the prime contractors so as to document any efforts made by them to "locate, train, utilize, assist," and develop DBEs.

of eliminating discriminatory barriers. Rather, this aspect of the SCC results in the spending of public funds in a way "which encourages, entrenches, subsidizes, or results in racial discrimination," *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 790, 39 L.Ed.2d 1 (1974). Where subcontracting to a DBE does not cause an increase in costs, the prime contractor receives additional payment because of a choice based only on race.

Adarand further argues the program at issue is not narrowly tailored because of the random or haphazard presumption of disadvantage available to racial groups that may never have suffered from discrimination in the construction industry, i.e. that it is over inclusive. *See Croson*, 488 U.S. at 506, 109 S.Ct. at 728. For example, Adarand states, there is no evidence that Aleuts, Samoans or Bhutans have been discriminated against in the Colorado construction industry.

The Defendants respond that nothing in *Adarand III*, *Wygant*, or *Croson* suggests that Congress must make such state-by-state findings. Rather, they assert, persons belonging to the groups deemed by Congress to be socially and economically disadvantaged in the United States because of their race or ethnicity are entitled to this presumption anywhere in the United States, being Congress' domain of legislative jurisdiction.

I agree that Congress' national jurisdiction allows it, where appropriate, to determine that discriminatory barriers exist with reference to specific groups. However, before making such determination, the requirement of narrow tailoring mandates that Congress "inquir[e] into whether or not the particular [entity] seeking a racial

preference has suffered from the effects of past discrimination. . . . " *Croson*, 488 U.S. at 508, 109 S.Ct. at 729 (distinguishing its facts from those in *Fullilove*).

Contrary to the Court's pronouncement that strict scrutiny is not "fatal in fact," I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as reason.

The statutes and regulations governing the SCC program are overinclusive in that they presume that all those in the named minority groups are economically and, in some acts and regulations, socially disadvantaged. This presumption is flawed, as is its corollary, namely that the majority (caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged. By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the SCC program is underinclusive.

The Defendants argue the SCC has safeguards to ensure that only bona fide DBEs may participate and asserts the CFLHD relies on the Colorado State certification process.[16] They enclose the application forms currently used by the Colorado Department of Regulatory

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[16] As noted, Colorado follows the guidelines in 49 C.F.R. part 23 in making such certification decisions. In so doing, it makes "a rebuttable presumption that individuals in the [specified] racial groups are socially and economically disadvantaged." *See* 49 C.F.R. § 23.62 (1995).

Affairs (DORA). According to the Defendants, Frankie Gonzales was found to be socially and economically disadvantaged because he was Hispanic and his firm met the size standards for certification. The forms submitted by the Defendants set out the mandates of 49 C.F.R. part 23 (1995) and require a substantial amount of information concerning the applicant, including information about racial background and the applicant's gross revenues and property holdings. These eligibility criteria, the Defendants submit, render the program narrowly tailored.

These recent forms are, however, significantly more extensive in their probing than those used when Gonzales first obtained DBE certification from the Colorado Department of Highways in 1985. The earlier forms have been substantially revised. The forms completed by Gonzales are centered almost exclusively on the question of ethnicity, inquiring about minority ownership percentages, and the race of the applicant. (Pl.'s Second Supp. Exs., Ex. K.) They ask whether the applicant firm is "owned and controlled by socially and economically disadvantaged individuals." If so, the firm is required to attach its certification from the SBA's 8(a) program to that effect. Gonzales, when marking the form checked "no" for this question, apparently because he was not certified as an 8(a) participant at that time.

Adarand also attaches the form used by the State of Colorado when it made its certification of Gonzales based on the forms he submitted. It supports a finding that Gonzales was certified solely because of his race. The first question asks the certifying authority to state if, based on the data furnished, the applicant is or is not "an eligible

concern." It then requires justification for this determination. On the form pertaining to Gonzales, the entire justification section reads: "Gonzales Construction is a 100% minority owned firm." (Pl.'s Supp. Exs., Ex. K.)

Both the race-centered forms actually used in Gonzales' DBE certification, and the later more inquiring forms submitted by the Defendants, sufficed for certification purposes under the STURAA regulations and the relevant SBA, STURAA, and ISTEA percentage goal provisions. This supports a conclusion that the presumptions of disadvantage set out in federal statutes and regulations are not narrowly tailored to those who have suffered the effects of prior discrimination in that they allow implementation in such a way as to permit an absolute preference to certain business entities based solely on their race.[17] *See Croson*, 488 U.S. at 507-509, 109 S.Ct. at 729-730.

I conclude the statutes and regulations implicated in the SCC program, with respect to the races included as presumptively disadvantaged, do not provide a reasonable assurance that the application of racial criteria will be limited to accomplishing the remedial objectives of Congress. *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779-80. As such, they are not narrowly tailored to serve the interest of eliminating discrimination in the construction industry.

Justice O'Connor drew attention to the issue of whether the differences in the statutes and regulations implicated in the SCC program are relevant to a strict

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[17] Indeed, under these standards, the Sultan of Brunei would qualify.

scrutiny analysis. *See Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2118. In my opinion, these disparities further indicate a lack of narrow tailoring.

As the Court noted, the SBA's 8(a) program mandates an individualized inquiry into each participant's economic disadvantage, *Adarand*, 515 U.S. at 237, 115 S.Ct. at 2118 (citing 13 C.F.R. § 124.106(a) (1994)). On the other hand, the DOT regulations implementing STURAA § 106(c) do not require the certifying authorities to make such individualized inquiries. *See* 49 C.F.R. § 23.62 (1994); 49 C.F.R. pt. 23, subpt. D, App. C (1996).

A similar contradiction exists between various regulations implementing the 8(d) program. Some require 8(d) participants to make the individualized showing applicable to 8(a) participants, although the standards applicable to the factors considered for 8(d) "are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program." 13 C.F.R. § 124.106(b) (1996). Others, however, allow potential 8(d) participants to avail themselves of the race-based presumption for social and economic disadvantage. *See* 48 C.F.R. 19.703(a)(2) (1996).

Further inconsistencies exist between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs. Whereas, to participate in the 8(a) program, the individual's ability to compete must have been impaired "as compared to others in the same or similar line of business who are not socially disadvantaged," 13 C.F.R. § 124.106(a)(1)(i) (1996), under § 124.106(b)(1), an 8(d)

participant need show such impairment only "as compared to others in the same or similar line of business," 13 C.F.R. § 124.106(b)(1) (1996).

The inconsistencies between these statutes and regulations and the resultant uncertainty as to who may or may not participate in the race-based SCC program preclude a finding of narrow tailoring. As discussed in relation to the different forms which have been used in the certifying process, without a well defined set of consistent definitions, the SCC program cannot provide the "reasonable assurance that the application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively." *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779.

Justice O'Connor also raised the issue of whether race-neutral means were considered before the enactment of the race-based program. *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2118. Adarand contends they were not. The Defendants respond the CFLHD implements § 644(g) of the SBA and § 106(c) of STURAA. They argue, before enacting the challenged statutes, Congress required the use of race-neutral measures but considered them an insufficient response to address discrimination against minorities in the highway construction business. Moreover, the Defendants maintain race-neutral mechanisms remain in place and the SCC is supplementary to those measures.

The Defendants submit Congress utilized race-neutral measures for at least twenty-five years before amending the SBA in 1978. In 1953 it passed the SBA, allowing the Small Business Administration to enter into contracts with the federal government and subcontract them out to small businesses. However, the Defendants state, in the ensuing fifteen years, minority-owned small businesses continued to be disproportionately excluded from government procurement. As a result, Congress authorized the Small Business Administration to subcontract to socially and economically disadvantaged businesses in an attempt to help minority-owned small businesses. In 1970, to help small businesses obtain surety bonds, the Small Business Administration was authorized by the Housing and Urban Development Act, Pub.L. 91-609, 84 Stat. 1813, 15 U.S.C. § 694a and b, to establish the Surety Bond Guaranty Program. This program covered surety companies for up to 90 percent of their losses on bonds. By 1975, however, the General Accounting Office reported that the "SBA's success in helping disadvantaged firms to become self-sufficient and competitive has been minimal." Library of Congress, Congressional Research Service, Minority Enterprise and Public Policy 53 (1977).

The Defendants assert Congress' 1978 reform of the SBA was based on the ineffectiveness of race-neutral measures in helping minority owned firms overcome the discriminatory barriers in federal procurement. Therefore, they argue, the § 644 goals were established only

after Congress determined that the race-neutral alternatives used before the 1978 amendments were not successful in opening opportunities for small disadvantaged businesses.

The Defendants also maintain Congress was aware that numerous other legislative and executive branch remedies, such as anti-discrimination legislation, executive action to remedy employment discrimination in federal contracting, and federal aid to minority businesses, had failed to eradicate discriminatory barriers. For example, minority contractors received less than 1 percent of federal contracts in 1977. 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke). Congress determined this was likely the product of discriminatory barriers. H.R.Rep. No. 94-468 at 1-2 (1975). *See Fullilove*, 448 U.S. at 511, 100 S.Ct. at 2791 (Powell, J., concurring) ("[B]y the time Congress enacted [the 'minority business enterprise' ('MBE') set-aside], it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"); and at 465-67, 100 S.Ct. at 2768-2769 (Burger, C.J. concurring) (finding that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set aside).

In its discussion of narrow tailoring, the *Croson* Court found there did not "appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." 488 U.S. at 507, 109 S.Ct. at 729. This suggests that there must have been an attempt in the industry in question to use race-neutral measures to eliminate racial barriers to minority participation. *Croson* acknowledged, without criticism, however, the findings of the principal opinion in *Fullilove*

that Congress had examined and rejected race-neutral measures in the construction industry before enacting the MBE set aside. This approach recognizes Congress' ability to legislate nationwide to address nationwide programs. Based on the numerous congressional records cited by the Defendants here and by the Court in *Fullilove*, I conclude Congress' earlier race-neutral measures sufficed to pass this aspect of strict scrutiny muster.

Adarand further contends the SCC program is not narrowly tailored because "[t]he race-based program at issue in this case awards between 10 and 18 percent of all federal highway construction contracts on the basis of race." (Mem. P. & A. Supp. P1's. Mot. Summ. J. at 19.) Adarand cites no authority for these "goals," which, it maintains, bear no relationship to the number of available DBEs. Their only justification, according to Adarand, is "outright racial balancing."

Adarand relies on Justice O'Connor's remarks in *Croson* that "the 30% quota cannot be said to be tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507, 109 S.Ct. at 729. Justice O'Connor was here rejecting the City of Richmond's adopted plan requiring prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more "Minority Business Enterprises."

The Defendants argue, unlike in *Croson*, here the SCC has no project goals, set asides or quotas and a primary

contractor is not mandated to make subcontract awards based on race. With respect to contracts containing the SCC, they assert, there is no requirement that primary contractors make subcontractor awards based on the race of the bidder. They maintain in over 87 percent of the contracts containing the SCC awarded in Colorado from the time of the West Dolores project to the date of the filing of the Defendants' motion, the prime contractor did not avail itself of the compensation offered by the SCC. (Defs.' Mot. Summ. J., Ex.5.)

The SCC itself imposes neither goals nor quotas. A prime contractor has the choice to subcontract work to DBE's, and thus qualify for the benefits of the SCC, but is not required to make such choice. This is more flexible than the "rigid racial quota" struck down in *Croson*, 488 U.S. at 499, 109 S.Ct. at 724-25 and the 10 percent set aside upheld in *Fullilove*, 448 U.S. at 513-14, 100 S.Ct. at 2792-93. Nevertheless, the use of the SCC is one means by which the government implements the statutory directives of the SBA, (requiring the President annually to establish Government-wide goals for participation by DBE's procurement contracts, at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year), 15 U.S.C. § 644(g), and STURAA and ISTEA (mandating that not less than 10 percent of the amounts authorized to be appropriated under the acts be expended with small disadvantaged concerns), STURAA, § 106(c), P.L. 100-17 (1987), ISTEA, § 1003(b), P.L. 102-240 (1991). *See Adarand III*, 515 U.S. at 204-07, 115 S.Ct. at 2102-03.

Thus, although the SCCs contain no quotas, they are used as one of the methods to attain the percentage goals

in the SBA, STURAA and ISTEA, and are thus inextricably linked with these goals. Insofar as the percentage goals are a foundation for the use of the SCCs, rooted in the same race-based presumptions contained in the SCCs, I find the statutory sections containing those goals insufficiently narrowly tailored for the same reasons as I stated in making that determination regarding the SCCs themselves.

Finally, Adarand states the remedial measures enacted by Congress and implemented by the Defendants are not "narrowly tailored" because they are "unlimited in scope and duration." The Defendants respond the appropriate inquiry is whether the challenged measures have been regularly reviewed to determine whether they are still needed. *See Fullilove*, 448 U.S. at 489, 100 S.Ct. at 2780.[18] They state, since 1982, Congress has regularly reviewed and reassessed STAA, STURAA and ISTEA and retained DBE provisions although in 1987, STURAA's 10 percent goal for DBE participation was modified to include women-owned businesses. The citations in Appendix I, the Defendants assert, reflect numerous hearings before congressional committees and congressional committee reports which show Congress has overseen the operation of these programs to determine whether they are working as intended and has concluded that continuing remedial efforts are needed. The Defendants note, unless Congress makes a further determination of need,

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[18] Notably, the regulations governing the 8(a) program limit participation therein to nine years from the date of certification and provide for premature termination for good cause.

the DBE program for highway and transit programs is scheduled to lapse at the end of fiscal year 1997.

The Defendants assert, under 15 U.S.C. § 644(g), government-wide goals are negotiated annually between the head of each agency and the Small Business Administration. They state Congress has reviewed evidence to determine whether the goals are achieving the desired result of remedying discrimination and the lingering effects of past discrimination nationwide and has determined there is a need to continue the DBE requirements of § 644(g).

When and in what circumstances, the SCC program will end seems unclear. However, because I have not found the SCC program to be narrowly tailored based on other relevant factors, I need not rule on the issue of whether the limitations stressed by the Defendants sufficiently ensure that the program "will not last longer than the discriminatory effect it is designed to eliminate." *See Fullilove*, 448 U.S. at 513, 100 S.Ct. at 2792-93.

Finally, relevant to the issue of narrow tailoring, is the degree of burden placed on nonminority businesses by the SCC program. The Defendants note the SCC might have the effect of providing DBEs with contracting opportunities that otherwise might have been available to non-DBEs, but that this incidental consequence does not render the SCC provision constitutionally defective as applied to Adarand. In this regard, the Defendants cite *Fullilove:*

> When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible. The actual

> "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities.

448 U.S. at 484, 100 S.Ct. at 2778 (citations and footnote omitted).

The Court's declaration in *Fullilove* was that such incidental burden may be permissible provided that it occurs in the course of executing a properly tailored remedy. Since I find the SCC program is not properly tailored, I do not reach the issue of assessing the relative burden shouldered by nonminority firms through its implementation.

VII. *Conclusion.*

For the aforesaid reasons, I conclude the SCC program at issue does not survive strict scrutiny. I therefore grant Adarand's motion for summary judgment, and deny that of the Defendants. Accordingly,

IT IS ORDERED THAT § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. §§ 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the subcontracting compensation clause program arising pursuant to those statutes and regulations, are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand Constructors, Inc. of its constitutional rights;

IT IS FURTHER ORDERED THAT the Defendants are enjoined from administering, enforcing, soliciting bids

for, or allocating any funds under the said subcontracting compensation programs.

Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

RODNEY SLATER, Secretary of the United States Department of Transportation, KENNETH WYKLE, Administrator of the Federal Highway Administration, VINCENT F. SCHIMMOLLER, Administrator of Region VIII, Federal Highway Administration, and LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 202 TO 378

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181pp

APPENDIX TABLE OF CONTENTS FOR PETITION FOR *WRIT OF CERTIORARI*

Adarand v. Slater, October 2000

VOLUME I

Opinion, Tenth Circuit, filed September 25, 2000, on remand .....App. 1

Order, Tenth Circuit, filed April 5, 2000, denying petition for rehearing *en banc* .....App. 99

Order, Tenth Circuit, filed February 18, 2000, (1) recalling mandate issued on May 27, 1999, to U.S. District Court for District of Colorado and (2) vacating judgment of Tenth Circuit issued March 4, 1999 .....App. 101

Adarand Constructors, Inc. v. Slater, 120 S.Ct. 722 (2000), filed January 12, 2000 .....App. 103

Order, Tenth Circuit, filed May 19, 1999, denying petition for rehearing *en banc* .....App. 113

Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999), filed March 4, 1999 .....App. 115

Adarand Constructors, Inc. v. Slater, 965 F.Supp 1556 (D.Colo. 1997), filed June 4, 1997 .....App. 128

VOLUME II

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) .....App. 202

U.S Constitution, Fifth Amendment .....App. 293

Surface Transportation and Uniform Relocation Assistance Act (STURAA), Section 106(c), 101 Stat. 132 .....App. 294

APPENDIX TABLE OF CONTENTS – Continued

Intermodal Surface Transportation Efficiency Act (ISTEA), Section 1003(b), 105 Stat. 1919-1921 App. 295

Transportation Equity Act for the Twenty First Century (TEA-21), Section 1101(b), Public Law 105-178 ..... App. 300

Small Business Act, Section 8(d), 15 U.S.C. § 637(d)(1)-(3), (5), (6) ..... App. 305

Small Business Act, 15 U.S.C. § 644(g)(1) ..... App. 315

TC-554 ..... App. 317

13 C.F.R. § 124.1002 (2000) ..... App. 320

13 C.F.R. § 124.104(b)(1) (2000) ..... App. 324

13 C.F.R. § 124.105 ..... App. 325

48 C.F.R. § 19.001 (2000) ..... App. 330

48 C.F.R. § 19.703 (2000) ..... App. 334

48 C.F.R. § 52.219-8 ..... App. 336

49 C.F.R. § 23.41(a)(3)(i), (b), (c) ..... App. 338

49 C.F.R. § 23.64(a), (c) ..... App. 340

49 C.F.R. § 23.68(b) ..... App. 341

49 C.F.R. Part 23, Appendix A to Subpart D .. App. 342

49 C.F.R. Part 23, Appendix C to Subpart D .. App. 348

49 C.F.R. Part 23, Subpart F, § 26.107 ..... App. 350

49 C.F.R. Part 23, Subpart B, § 26.21 ..... App. 352

49 C.F.R. § 26.3(d) (2000) ..... App. 353

49 C.F.R. § 26.51 (2000) ..... App. 354

APPENDIX TABLE OF CONTENTS – Continued

49 C.F.R. Part 23, Subpart D § 26.61 ..... App. 360

49 C.F.R. § 26.65 ..... App. 361

49 C.F.R. § 26.67(b)(1) (2000) ..... App. 362

49 C.F.R. § 26.87 ..... App. 363

49 C.F.R. Part 26, Appendix E ..... App. 364

Defendants' Memorandum in Support of Their Motion for Summary Judgment, Appendix I, Civil Action No. 90-K-1413, filed May 1, 1996, U.S. District Court for the District of Colorado ..... App. 367

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner

v.

Federico PENA, Secretary of Transportation, et al.

No. 93-1841.

Argued Jan. 17, 1995,

Decided June 12, 1995

William Perry Pendley, Denver, CO, for petitioner.

Drew S. Days, III, New Haven, CT, for respondents.

Justice O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, and an opinion with respect to Part III-C in which Justice KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied. We therefore vacate the Court of

Appeals' judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.*, at 28-31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian

Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act (Act), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).

In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled

by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, *e.g.*, 13 CFR §§ 124.303-124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case, 15 U.S.C. § 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged . . . pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social disadvantage is not

enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in § 124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, § 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social and economic disadvantage. 48 CFR §§ 19.001, 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. 13 CFR §§ 124.111(c)-(d), 124.601-124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100-17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by

socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." § 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." § 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i.e.*, eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR § 23.69 (1994).

The operative clause in the contract in this case reads as follows:

> "*Subcontracting*. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
>
> "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .
>
> "A small business concern will be considered a DBE after it has been certified as such by

> the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).
>
> . . .
>
> "The Contractor will be paid an amount computed as follows:
>
> "1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> "2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24-26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer. Any of the three routes to such certification described above – SBA's 8(a) or 8(d) program, or certification by a State under the DOT regulations – would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F.3d 1537 (1994). It understood our decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F.3d, at 1544. Applying that "lenient standard," as further developed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. 16 F.3d, at 1547. We granted certiorari. 512 U.S. 1288, 115 S.Ct. 41, 129 L.Ed.2d 936 (1994).

II

Adarand, in addition to its general prayer for "such other and further relief as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22-23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we

express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Id.*, at 105, 103 S.Ct., at 1667.

If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to Adarand. We note that, contrary to respondents' suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at 666, 113 S.Ct., at 2303.

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is '*certainly* impending.' " *Lujan, supra*, at 565, n. 2, 112 S.Ct., at 2138, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5-A. According to documents produced in discovery, the CFLHD let 14 prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90-C-1413, Exh. I, Attachment A (D.Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not include a subcontractor compensation clause. *Ibid.*; see also *id.*, Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average 1 ½ contracts

per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.*, Exh. F, Attachments 1-3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

Respondents urge that "[t]he Subcontracting Compensation Clause program is . . . a program based on disadvantage, not on race," and thus that it is subject only to "the most relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. Respondents concede, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. *Id.*, at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory

purpose. See generally *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

A

Through the 1940's, this Court had routinely taken the view in non-race-related cases that, "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank v. United States*, 317 U.S. 329, 337, 63 S.Ct. 297, 301, 87 L.Ed. 304 (1943); see also, *e.g.*, *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468, 62 S.Ct. 341, 343, 86 L.Ed. 482 (1941); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392, 41 S.Ct. 528, 532, 65 L.Ed. 998 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment . . . ; but clearly they are not in

point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed – correctly – that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id.*, at 100, 63 S.Ct., at 1385. But it also cited *Detroit Bank* for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," 320 U.S., at 100, 63 S.Ct., at 1385, and upheld the curfew because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." *Id.*, at 102, 63 S.Ct., at 1386.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank*, that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil

rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." 323 U.S., at 216, 65 S.Ct., at 194. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications than are the States. Cf. *id.*, at 234-235, 65 S.Ct., at 202 (Murphy, J., dissenting) ("[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles we announced in the *Hirabayashi* case," *id.*, at 217, 65 S.Ct., at 194, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.," *id.*, at 218, 65 S.Ct., at 195, the racially discriminatory order was nonetheless within the Federal Government's power.

In *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' " *id.*, at 499, 74 S.Ct., at 694. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*, at 500, 74 S.Ct., at 695.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," *Hirabayashi, supra*, 320 U.S., at 100, 63 S.Ct., at 1385, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," *Korematsu, supra*, 323 U.S., at 216, 65 S.Ct., at 194, carry no less force in the context of federal action than in the context of action by the States – indeed, they first appeared in cases concerning action by the Federal Government. *Bolling* relied on those observations, 347 U.S., at 499, n. 3, 74 S.Ct., at 694, n. 3, and reiterated " 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination *by the General Government, or by the States*, against any citizen because of his race,' " *id.*, at 499, 74 S.Ct., at 694 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, a 1964 case that struck down a race-based state law:

> "[W]e deal here with a classification based upon the race of the participants, which must be

> viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' *Bolling v. Sharpe*, 347 U.S. 497, 499 [74 S.Ct. 693, 694]; and subject to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U.S. 214, 216 [65 S.Ct. 193, 194]; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 81, 100 [63 S.Ct. 1375, 1385]." *Id.*, at 191-192, 85 S.Ct., at 288.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C.L.Rev. 541, 554 (1977). *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which struck down a race-based state law, cited *Korematsu* for the proposition that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.' " 388 U.S., at 11, 87 S.Ct., at 1823. The various opinions in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973),

which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), a case that invalidated sex discrimination by a State, without mentioning any possibility of a difference between the standards applicable to state and federal action. *Frontiero*, 411 U.S. at 682-684, 93 S.Ct., at 1768-1769 (plurality opinion of Brennan, J.); *id.*, at 691, 93 S.Ct., at 1772 (Stewart, J., concurring in judgment); *id.*, at 692, 93 S.Ct., at 1773 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514; see also *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *United States v. Paradise*, 480 U.S. 149, 166, n. 16, 107 S.Ct. 1053, 1064, n. 16, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate, *e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101-102, n. 21, 96 S.Ct. 1895, 1903, 1904-1905, n. 21, 48 L.Ed.2d 495 (1976) (federal power over immigration), to detract from this general rule.

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities.' " *Id.*, at 287-288, 98 S.Ct., at 2747 (opinion of Powell, J.) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938)). *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S., at 289-290, 98 S.Ct., at 2748. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.*, at 291, 98 S.Ct., at 2748. On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see *id.*, at 359, 98 S.Ct., at 2783 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds.

Id., at 411-412, 421, 98 S.Ct., at 2809-2810, 2815 (STEVENS, J., joined by Burger, C.J., and Stewart and REHNQUIST, JJ., concurring in judgment in part and dissenting in part).

Two years after *Bakke*, the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke*, there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S., at 491, 100 S.Ct., at 2781. That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.*, at 492, 100 S.Ct., at 2781. It employed instead a two-part test which asked, first, "whether the *objectives* of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.*, at 473, 100 S.Ct., at 2772. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial review under either 'test' articulated in the several *Bakke* opinions." *Id.*, at 492, 100 S.Ct., at 2781. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in

his *Bakke* opinion – *i.e.*, it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest" – and had done so correctly. 448 U.S., at 496, 100 S.Ct., at 2783-2784 (concurring opinion). Justice Stewart (joined by then-Justice REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, *id.*, at 523, and n. 1, 100 S.Ct., at 2797, and n. 1, and that the program before the Court failed that standard. Justice STEVENS also dissented, arguing that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *id.*, at 537, 100 S.Ct., at 2805, and that the program before the Court could not be characterized "as a 'narrowly tailored' remedial measure." *Id.*, at 541, 100 S.Ct., at 2807. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in *Bakke* that any race-based governmental action designed to "remed[y] the present effects of past racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective" – *i.e.*, such action should be subjected only to what we now call "intermediate scrutiny." 448 U.S., at 518-519, 100 S.Ct., at 2795.

In *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in *Wygant* was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does

not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," *id.*, at 273, 106 S.Ct., at 1846, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Id.*, at 274, 106 S.Ct., at 1847. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.' " *Id.*, at 285, 106 S.Ct., at 1852 (O'CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," *id.*, at 274, 106 S.Ct., at 1847, was not a compelling interest that could justify the use of a racial classification. It added that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *id.*, at 276, 106 S.Ct., at 1848, and insisted instead that "a public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," *id.*, at 277, 106 S.Ct., at 1848-1849. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." *Id.*, at 295, 106 S.Ct., at 1858. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. *Id.*, at 301-302, 106 S.Ct., at

1861-1862 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. *See United States v. Paradise*, 480 U.S., at 166, 107 S.Ct., at 1063 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, *e.g.*, *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); *Williams v. New Orleans*, 729 F.2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 851 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984).

The Court resolved the issue, at least in part, in 1989. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned

businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.*, at 493-494, 109 S.Ct., at 722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); *id.*, at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("I agree . . . with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," *id.*, at 491-492, 109 S.Ct., at 720-721, but the Court thought that the city had not acted with "a 'strong basis in evidence for its conclusion that remedial action was necessary,' " *id.*, at 500, 109 S.Ct., at 725 (majority opinion) (quoting *Wygant*, *supra*, at 277, 106 S.Ct., at 1849 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U.S., at 508, 109 S.Ct., at 729-730.

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here," because *Croson*'s facts did not implicate Congress' broad

power under § 5 of the Fourteenth Amendment. *Id.*, at 491, 109 S.Ct., at 720 (plurality opinion); see also *id.*, at 522, 109 S.Ct., at 737 (SCALIA, J., concurring in judgment) ("[W]ithout revisiting what we held in *Fullilove* . . . , I do not believe our decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that *Croson* had at least some bearing on federal race-based action when it vacated a decision upholding such action and remanded for further consideration in light of *Croson*. *H.K. Porter Co. v. Metropolitan Dade County*, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989); see also *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in H.K. Porter Co.), rev'd *sub nom. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, *e.g.*, *Mann v. Albany*, 883 F.2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); *Shurberg*, 876 F.2d, at 910 (noting the difficulty of extracting general principles from the Court's fractured opinions); *id.*, at 959 (Wald, J., dissenting from denial of rehearing en banc) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a

congressional mandate of racial preferences"), aff'd *sub nom. Metro Broadcasting, supra*.

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant*, 476 U.S., at 273, 106 S.Ct., at 1847 (plurality opinion of Powell, J.); *Fullilove*, 448 U.S., at 491, 100 S.Ct., at 2781 (opinion of Burger, C.J.); see also *id.*, at 523, 100 S.Ct., at 2798 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin*, 379 U.S., at 192, 85 S.Ct., at 288 ("[R]acial classifications [are] 'constitutionally suspect' "); *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson*, 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *id.*, at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment); see also *Bakke*, 438 U.S., at 289-290, 98 S.Ct., at 2747-2748 (opinion of Powell, J.), i.e., all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo*, 424 U.S., at 93, 96 S.Ct., at 670; see also *Weinberger v. Wiesenfeld*, 420 U.S., at 638, n. 2, 95 S.Ct., at 1228, n. 2; *Bolling v. Sharpe*, 347 U.S.,

at 500, 74 S.Ct., at 694. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [*Korematsu*], but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S. [1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948)]." *Bakke, supra*, 438 U.S., at 299, 98 S.Ct., at 2753 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. *Metro Broadcasting, Inc. v. FCC*, involved a Fifth Amendment challenge to two race-based policies of the

Federal Communications Commission (FCC). In *Metro Broadcasting*, the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling, supra*, at 500, 74 S.Ct., at 694. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "[B]enign" federal racial classifications, the Court said, " – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting*, 497 U.S., at 564-565, 110 S.Ct., at 3008-3009 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confiden[ce] that an 'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." *Id.*, at 564, n. 12, 110 S.Ct., at 3009, n. 12 (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. *Id.*, at 566, 110 S.Ct., at 3009. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," *Id.*, at 566-567, 110 S.Ct., at 3009-3010, and that they

were "substantially related" to that objective, *id.*, at 569, 110 S.Ct., at 3011. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson, supra*, at 493, 109 S.Ct., at 721 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke, supra*, at 298, 98 S.Ct., at 2752 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks

to allocate its resources by way of an explicit racial classification system." Days, *Fullilove*, 96 Yale L.J. 453, 485 (1987).

Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two – skepticism of all racial classifications and consistency of treatment irrespective of the race of the burdened or benefited group. Under *Metro Broadcasting*, certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race – a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385 – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.*, should tolerate no

retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, Justice STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications." With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

Justice STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Ibid.* He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account – indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision-making. And Justice STEVENS concedes that "some cases may be difficult to classify," all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "trea[t] dissimilar race-based decisions

as though they were equally objectionable," to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove*, 448 U.S., at 534, 100 S.Ct., at 2803 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

Justice STEVENS chides us for our "supposed inability to differentiate between 'invidious' and 'benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And Justice STEVENS himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception – *especially when fostered by the Congress of the United States* – can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of

statute." *Fullilove*, 448 U.S., at 545, 100 S.Ct., at 2809 (dissenting opinion) (emphasis added; footnote omitted); see also *id.*, at 537, 100 S.Ct., at 2805 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Croson*, 488 U.S., at 516-517, 109 S.Ct., at 734 (STEVENS, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of "consistency" and "congruence" in conjunction with it, that leads Justice STEVENS to dissent. According to Justice STEVENS, our view of consistency "equate[s] remedial preferences with invidious discrimination," and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat." It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in

turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson*, see 488 U.S., at 493-494, 109 S.Ct., at 721-722 (plurality opinion); *id.*, at 520-521, 109 S.Ct., at 735-736 (SCALIA, J., concurring in judgment); see also *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 2824-2845, 125 L.Ed.2d 511 (1993); *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991). Justice STEVENS does not explain how his views square with *Croson*, or with the long line of cases understanding equal protection as a personal right.

Justice STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, *e.g.*, *Metro Broadcasting*, 497 U.S., at 605-606, 110 S.Ct., at 3030-3031 (O'CONNOR, J., dissenting); *Croson*, 488 U.S., at 486-493, 109 S.Ct., at 717-722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White, J.); *id.*, at 518-519, 109 S.Ct., at 734-735 (KENNEDY, J., concurring in part and concurring in judgment); *id.*, at 521-524, 109 S.Ct., at 736-738 (SCALIA, J.,

concurring in judgment); *Fullilove*, 448 U.S., at 472-473, 100 S.Ct., at 2771-2772 (opinion of Burger, C.J.); *id.*, at 500-502, and nn. 2-3, 515, and n. 14, 100 S.Ct., at 2786-2787, and nn. 2-3, 2793, and n. 14 (Powell, J., concurring); *id.*, at 526-527, 100 S.Ct., at 2799-2800 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that Justice STEVENS' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, is incorrect.

C

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make

the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, *Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years. Those principles together stood for an "embracing" and "intrinsically soun[d]" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in *Helvering*: We cannot adhere to our most recent decision without colliding with an accepted and established doctrine. We also note that *Metro Broadcasting's* application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, e.g., Fried, *Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality, 104 Harv.L.Rev. 107, 113-117 (1990) (arguing that *Metro Broadcasting's* adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Comment, *Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight, 69 Texas L.Rev. 125, 145-146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC*: The Solution Almost Nobody Wanted, 59 UMKC L.Rev. 293, 297, 316-317 (1991) (criticizing "anomalous results as exemplified by the two different standards of review"); Katz, Public Affirmative

Action and the Fourteenth Amendment: The Fragmentation of Theory After *Richmond v. J.A. Croson Co.* and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. Marshall L.Rev. 317, 319, 354-355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), we overruled the recent case of *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon, supra*, at 704, 712, 113 S.Ct., at 2860, 2864. In *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), we overruled *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." *Solorio, supra*, at 439-441, 450-451, 107 S.Ct., at 2926-2928, 2932-2933. And in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), we overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." *Continental T.V., supra*, at 47-48, 58, 97 S.Ct., at 2556, 2561. See also, e.g., *Payne v. Tennessee*, 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v.*

Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)); *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695-701, 98 S.Ct. 2018, 2038-2041, 56 L.Ed.2d 611 (1978) (partially overruling *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), because *Monroe* was a "departure from prior practice" that had not engendered substantial reliance); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-129, 86 S.Ct. 258, 267-268, 15 L.Ed.2d 194 (1965) (overruling *Kesler v. Department of Public Safety of Utah*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962), to reaffirm "pre-*Kesler* precedent" and restore the law to the "view . . . which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law," *id.*, at 854, 112 S.Ct., at 2808. In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself, *id.*, at 856, 112 S.Ct., at 2809 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained, we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases – and did so

quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834, 838-839, 130 L.Ed.2d 753 (1995) (declining to overrule *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), where "private parties have likely written contracts relying upon *Southland* as authority" in the 10 years since *Southland* was decided).

Justice STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis*. But again, he misunderstands our position. We have acknowledged that, after *Croson*, "some uncertainty persisted with respect to the standard of review for federal racial classifications," and we therefore do not say that we "merely restor[e] the *status quo ante*" today. But as we have described, we think that well-settled legal principles pointed toward a conclusion different from that reached in *Metro Broadcasting*, and we therefore disagree with Justice STEVENS that "the law at the time of that decision was entirely open to the result the Court reached." We also disagree with Justice STEVENS that Justice Stewart's dissenting opinion in *Fullilove* supports his "novelty" argument. Justice Stewart said that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth

Amendment.' " *Fullilove*, 448 U.S., at 523, and n. 1, 100 S.Ct., at 2798, and n. 1. He took the view that "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." *Id.*, at 524, 100 S.Ct., at 2798. Justice Stewart gave no indication that he thought he was addressing a "novel" proposition. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like *Buckley*, *Loving*, *McLaughlin*, *Bolling*, *Hirabayashi*, and *Korematsu*, see *Fullilove*, *supra*, at 524-526, 100 S.Ct., at 2798-2800, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." *Helvering*, 309 U.S., at 122, 60 S.Ct., at 453. *Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

D

Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a

compelling governmental interest, and must be narrowly tailored to further that interest. See *Fullilove*, 448 U.S., at 496, 100 S.Ct., at 2783-84 (concurring opinion). (Recall that the lead opinion in *Fullilove* "d[id] not adopt . . . the formulas of analysis articulated in such cases as [*Bakke*]." *Id.*, at 492, 100 S.Ct., at 2781 (opinion of Burger, C.J.).) Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

Some have questioned the importance of debating the proper standard of review of race-based legislation. See, *e.g.*, *Croson*, 488 U.S., at 514-515, and n. 5, 109 S.Ct., at 733, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. *Metro Broadcasting*, 497 U.S., at 610, 110 S.Ct., at 3033 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with Justice STEVENS that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, *supra*, at 533-535, 537, 100 S.Ct., at 2803-2804, 2805 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that

courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare *Korematsu*, 323 U.S., at 223, 65 S.Ct., at 197 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Pub.L. 100-383, § 2(a), 102 Stat. 903-904 ("[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove*, *supra*, at 519, 100 S.Ct., at 2795 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise*, 480 U.S., at 167, 107 S.Ct., at 1064 (plurality opinion of Brennan, J.); *id.*, at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in

judgment); *id.*, at 196, 107 S.Ct., at 1079-1080 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

IV

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F.3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting, *Croson, supra*, at 507, 109 S.Ct., at 729, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove, supra*, at 513, 100 S.Ct., at 2792-2793 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR § 124.106(a) (1994), whereas the DOT's regulations implementing STURAA § 106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR § 124.106(b) (1994) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR § 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra*. We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business *who are not socially disadvantaged*," 13 CFR § 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," § 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as

these may have to that question, should be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III-C, and except insofar as it may be inconsistent with the following: In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, 109 S.Ct. 706, 735-736, 102 L.Ed.2d 854 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, § 1 ("[N]or shall any State . . . deny *to any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, § 1 (prohibiting abridgment of the right to vote "on account of race"), or based on blood, see Art. III, § 3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that

produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

Justice THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice STEVENS' and Justice GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the

principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression." It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid*. But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, Justice STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See *Fullilove v. Klutznick*, 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980)

(STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.* In each instance, it is racial discrimination, plain and simple.

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." I shall comment on each of these propositions, then add a few words about *stare decisis*, and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

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* It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," either turns on " 'whose ox is gored,' " *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295, n. 35, 98 S.Ct. 2733, 2751, n. 35, 57 L.Ed.2d 750 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate." *Fullilove v. Klutznick*, 448 U.S. 448, 533-535, 100 S.Ct. 2758, 2804, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, *id.*, at 480, 100 S.Ct., at 2775-2776; in Justice Powell's concurrence, *id.*, at 496, 100 S.Ct., at 2783-2784; and in my dissent in *Fullilove*, *id.*, at 533-534, 100 S.Ct., at 2803-2804. I welcome its renewed endorsement by the Court today. But, as the opinions in *Fullilove* demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue.

II

The Court's concept of "consistency" assumes that there is no significant difference between a decision by

the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976), should ignore this distinction.[1]

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[1] As Justice GINSBURG observes, the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate " 'relevant differences,' " surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See *Missouri v. Jenkins*, 515 U.S. 70, 112, 115 S.Ct. 2038, 2060-2061, 132 L.Ed.2d 63 (1995) (O'CONNOR, J., concurring) ("[T]ime and again, we have recognized the ample authority legislatures possess to combat racial injustice. . . . It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign

To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II, *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens – a curfew and exclusion from certain areas on the West Coast[2] – on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that war. Now suppose Congress decided to reward that service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. Cf. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870

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race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different – something less strict – when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

[2] These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese-Americans during that War. They were, however, the only such burdens this Court had occasion to address in *Hirabayashi* and *Korematsu*. See *Korematsu*, 323 U.S., at 223, 65 S.Ct., at 197 ("Regardless of the true nature of the assembly and relocation centers . . . we are dealing specifically with nothing but an exclusion order").

(1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834[3] as comparable to the official discrimination against African-Americans that was prevalent for much of our history.

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law

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[3] See *Morton v. Mancari*, 417 U.S. 535, 541, 94 S.Ct. 2474, 2478, 41 L.Ed.2d 290 (1974). To be eligible for the preference in 1974, an individual had to " 'be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' " *Id.*, at 553, n. 24, 94 S.Ct., at 2484, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classification was not "racial" because it did not encompass all Native Americans. 417 U.S., at 553-554, 94 S.Ct., at 2484-2485. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. *Id.*, at 551-552, 94 S.Ct., at 2483-2484. In this case Respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases may be difficult to classify,[4] but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a disfavored few and state action that benefits the few "in spite of" its adverse effects on the many. *Feeney*, 442 U.S., at 279, 99 S.Ct., at 2296.

Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect." *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Surely this distinction is at least as subtle, and at

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[4] For example, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.

least as difficult to apply, see *id.*, at 253-254, 96 S.Ct., at 2054 (concurring opinion), as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451-455, 105 S.Ct. 3249, 3260-3262, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98-110, 93 S.Ct. 1278, 1329-1336, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans – even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. See *Associated General Contractors of Cal., Inc. v. San Francisco*, 813 F.2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a

disadvantaged minority.[5] Indeed, as I have previously argued, the former is virtually always repugnant to the

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[5] In his concurrence, Justice THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. Although I agree that this cost may be more significant than many people realize, see *Fullilove v. Klutznick*, 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality – perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find Justice THOMAS' extreme proposition – that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, – at all persuasive. It is one thing to question the wisdom of affirmative-action programs: There are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents – whether members of majority or minority races – who have supported affirmative action over the years, to segregationists and bigots. Finally, although Justice THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court's jurisprudence, see *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), but not without a strong element of common sense, see *id.*, at 252-256, 96 S.Ct., at 2053-2055 (STEVENS, J., concurring); *id.*, at 256-270, 96 S.Ct., at 2055-2062 (BRENNAN, J., dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as

principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 316-317, 106 S.Ct. 1842, 1869-70, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting).[6] By insisting on a

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severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See *Fullilove*, 448 U.S., at 521, 100 S.Ct., at 2796-2797 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism." If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

[6] As I noted in *Wygant*:

> "there is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.
>
> "The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is 'utterly irrational,' *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 452, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion

doctrinaire notion of "consistency" in the standard applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

III

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by Members of today's majority. Thus, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), in which we upheld a federal program designed to foster racial diversity in broadcasting, we identified the special "institutional competence" of our National Legislature. *Id.*, at

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> whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality." 476 U.S., at 316-317, 106 S.Ct., at 1869 (dissenting opinion).

563, 110 S.Ct., at 3008. "It is of overriding significance in these cases," we were careful to emphasize, "that the FCC's minority ownership programs have been specifically approved – indeed, mandated – by Congress." *Ibid.* We recalled the several opinions in *Fullilove* that admonished this Court to " 'approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.' [*Fullilove*, 448 U.S.], at 472 [100 S.Ct., at 2771]; see also *id.*, at 491 [100 S.Ct., at 2781]; *id.*, at 510, and 515-516, n. 14 [100 S.Ct., at 2791, 2794, n. 14] (Powell, J., concurring); *id.*, at 517-520 [100 S.Ct., at 2794-2796] (MARSHALL, J., concurring in judgment)." 497 U.S., at 563, 110 S.Ct., at 3008. We recalled that the opinions of Chief Justice Burger and Justice Powell in *Fullilove* had "explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." 497 U.S., at 563, 110 S.Ct., at 3008 (citations and footnote omitted).

The majority in *Metro Broadcasting* and the plurality in *Fullilove* were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-524, 109 S.Ct. 706, 735-738, 102 L.Ed.2d 854 (1989), Justice SCALIA discussed the basis for this distinction. He observed that "it is one thing to permit racially based conduct by the Federal Government – whose legislative powers concerning matters of race were

explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5 – and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1." *Id.*, at 521-522, 109 S.Ct., at 736. Continuing, Justice SCALIA explained why a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Id.*, at 522, 109 S.Ct., at 737.

> "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776-1787, pp. 499-506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:
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> " 'The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common

> motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.' The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961)." *Id.*, at 523 (opinion concurring in judgment).

In her plurality opinion in Croson, Justice O'CONNOR also emphasized the importance of this distinction when she responded to the city's argument that *Fullilove* was controlling. She wrote:

> "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." 488 U.S., at 490, 109 S.Ct., at 720 (joined by REHNQUIST, C.J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel

the effects of that program. This difference recalls the goals of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-768, n. 2, 65 S.Ct. 1515, 1519-1520, n. 2, 89 L.Ed. 1915 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.

Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster

equality than the deference due a state legislature.[7] The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.[8]

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[7] Despite the majority's reliance on *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, *Korematsu* specifies that "all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect." 323 U.S., at 216, 65 S.Ct., at 194 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority.

[8] We have rejected this proposition outside of the affirmative-action context as well. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 96 S.Ct. 1895, 1903-1904, 48 L.Ed.2d 495 (1976), we held:

> "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."

Our opinion in *Metro Broadcasting* relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals. 497 U.S., at 563, 110 S.Ct., at 3008. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in *Fullilove*, with respect to the States themselves.[9] When Congress does this, it draws its power directly from § 5 of the

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[9] The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster subcontracting by disadvantaged business enterprises, or "DBE's." STURAA is also the source of funding for DBE preferences in federal highway contracting. Approximately 98% of STURAA's funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as "disadvantaged" for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA § 106(c)(4), 101 Stat. 146.

In this case, Adarand has sued only the federal officials responsible for implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority's "congruence" rationale would apply to federally regulated state contracts, which may conceivably be within the majority's view of Congress' § 5 authority even if the federal contracts are not. See *Metro Broadcasting*, 497 U.S., at 603-604, 110 S.Ct., at 3029-3030 (O'CONNOR, J., dissenting). As I read the majority's opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain.

Fourteenth Amendment.[10] That section reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the "provisions of this article" that Congress is thus empowered to enforce reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States.[11] This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be

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[10] Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's application to pure federal regulation of individuals.

[11] We have read § 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In *Katzenbach*, this meant that Congress under § 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of § 1. *Id.*, at 648-651, 86 S.Ct., at 1722-1724. Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

IV

The Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it were more important than our actual holdings. In my opinion that treatment is incorrect.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 and the second in 1990, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445, the Court upheld the program. Today the Court explicitly overrules *Metro Broadcasting* (at least in part), and undermines *Fullilove* by recasting the standard on which it rested and by calling even its holding into question. By way of explanation, Justice O'CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." A skeptical observer might ask whether this pronouncement is a faithful application of

the doctrine of *stare decisis*.[12] A brief comment on each of the two ailing cases may provide the answer.

In the Court's view, our decision in *Metro Broadcasting* was inconsistent with the rule announced in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). But two decisive distinctions separate those two cases. First, *Metro Broadcasting* involved a federal program, whereas Croson involved a city ordinance. *Metro Broadcasting* thus drew primary support from *Fullilove*, which predated *Croson* and which *Croson* distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although Members of today's majority trumpeted the importance of that distinction in *Croson*, they now reject it in the name of "congruence." It is therefore quite wrong for the Court to suggest today that overruling *Metro Broadcasting* merely restores the *status quo ante*, for the law at the time of that decision was entirely open to the result the Court reached. *Today's* decision is an unjustified departure from settled law.

Second, *Metro Broadcasting's* holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the Federal Communications Commission (FCC) program we upheld in that case would have satisfied any of our various standards in affirmative-action cases – including

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[12] Our skeptical observer might also notice that Justice O'CONNOR's explanation for departing from settled precedent is joined only by Justice KENNEDY. Three Members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of *stare decisis*.

the one the majority fashions today. What truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-319, 98 S.Ct. 2733, 2759-2763, 57 L.Ed.2d 750 (1978). Later, in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see *id.*, at 314-315, 98 S.Ct., at 2760-61 (STEVENS, J., dissenting); in response, Justice O'CONNOR correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.*, at 288, n., 106 S.Ct., at 1854, n. She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." *Ibid.*

Thus, prior to *Metro Broadcasting*, the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by

the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today – indeed, the question is not remotely presented in this case – and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.

The Court's suggestion that it may be necessary in the future to overrule *Fullilove* in order to restore the fabric of the law, is even more disingenuous than its treatment of *Metro Broadcasting*. For the Court endorses the "strict scrutiny" standard that Justice Powell applied in *Bakke*, and acknowledges that he applied that standard in *Fullilove* as well. Moreover, Chief Justice Burger also expressly concluded that the program we considered in *Fullilove* was valid under any of the tests articulated in *Bakke*, which of course included Justice Powell's. 448 U.S., at 492, 100 S.Ct., at 2781-82. The Court thus adopts a standard applied in *Fullilove* at the same time it questions that case's continued vitality and accuses it of departing from prior law. I continue to believe that the *Fullilove* case was incorrectly decided, see *id.*, at 532-554, 100 S.Ct., at 2802-2814 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, *id.*, at 522-532, 100 S.Ct., at 2797-2803, contained any suggestion that the issue the Court was resolving had been decided before.[13]

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[13] Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court's precedents. See 448 U.S., at 523-526, 100 S.Ct., at 2797-2799. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmatiye action had been decided before *Fullilove*. The fact that a Justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

As was true of *Metro Broadcasting*, the Court in *Fullilove* decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely "restoring" previously settled law.

V

The Court's holding in *Fullilove* surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in *Fullilove*, is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, STURAA, 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to DBE's significantly less objectionable than the 1977 categorical grant of $400 million in exchange for a 10% set-aside in public contracts to "a class of investors defined solely by racial characteristics." *Fullilove*, 448 U.S., at 532, 100 S.Ct., at 2803 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in *Fullilove* had prevailed, this program would be valid.

Unlike the 1977 Act, the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA,[14] gives rise to a second rebuttable presumption of economic disadvantage. 49 CFR § 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR §§ 124.105(c), 124.106 (1995); 48 CFR § 19.703 (1994); 49 CFR pt. 23, subpt. D., Apps. A and C (1994). Thus, the current preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian-American or an African-American, see *Fullilove*, 448 U.S., at 537-538, 540, 543-544, and n. 16, 546, 100 S.Ct., at 2805-2806, 2806-2807, 2808-2809, and n. 16, 2809-2810

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[14] STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR § 23.62 (1994). In contrast, § 8(a) of the SBA accords a presumption only of social disadvantage, 13 CFR § 124.105(b) (1995); the applicant has the burden of demonstrating economic disadvantage, *id.*, § 124.106. Finally, § 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or must be shown. See 15 U.S.C. § 637(d)(3) (1988 ed. and Supp. V); 13 CFR § 124.601 (1995).

(STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.[15] 13 CFR § 124.106(a)(1)(ii) (1995); 49 CFR § 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice – along with its lingering effects – still survives.[16] The presumption of economic disadvantage embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumptions can be rebutted. 13 CFR §§ 124.601-124.610 (1995); 49 CFR § 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only

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[15] The Government apparently takes this exclusion seriously. See *Autek Systems Corp. v. United States*, 835 F.Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner's personal income disqualified him from DBE status under § 8(a) program), aff'd, 43 F.3d 712 (CADC 1994).

[16] "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."

"Our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong.Rec. 34097 (1978).

when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties – specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom – or with whose friends – they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors.

The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of

the status of DBE's, 15 U.S.C. §§ 637(a)(1)(B)-(C) (1988 ed., Supp. V); 13 CFR § 124.602(a) (1995),[17] and DBE status can be challenged by a competitor at any time under any of the routes to certification. 13 CFR § 124.603 (1995); 49 CFR § 23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will "graduate" into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR § 124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement – numerical or otherwise – that a general contractor must hire DBE subcontractors. The program we upheld in *Fullilove* required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no

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[17] The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE's under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. Respondents point us to no provisions for review of § 8(d) certification, although such review may be derivative for those businesses that receive § 8(d) certification as a result of § 8(a) or STURAA certification.

quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE's, and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. *Bakke*, 438 U.S., at 319-320, 98 S.Ct., at 2763-2764 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see *Fullilove*, 448 U.S., at 549-550, 100 S.Ct., at 2811-2812 (STEVENS, J., dissenting), and the extensive hearings conducted in several Congresses before the current program was developed.[18] However we might evaluate the

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[18] Respondents point us to the following legislative history: H.R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H.R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U.S. Economy: Hearing before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women-Owned Businesses – An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs – Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988); Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9-10, n. 9.

benefits and costs – both fiscal and social – of this or any other affirmative-action program, our obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove*. If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution – a vision the Court expressly endorses today – it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

VI

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency"

ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of *stare decisis* ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc., was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of discrimination, as under *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), sufficient to justify surpassing the congressional objective. See 16 F.3d 1537, 1544 (CA10 1994) ("The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under Croson because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress"); *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp. 240, 242 (Colo.1992) ("Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made

by the defendants as allegedly required by *City of Richmond v. Croson*"); cf. Complaint ¶ 28, App. 20 (federal regulations violate the Fourteenth and Fifteenth Amendments by requiring "the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts").

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which respondents acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is applied, and petitioner did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided.

As the Court's opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have been certified as disadvantaged business enterprises (DBE's) on the basis of certain race-based presumptions. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing remedies for the continuing effects of past discrimination, see, *e.g.*, *Fullilove, supra*, at 465-466, 100 S.Ct., at 2768 (citing legislative history describing SBA § 8(a) as remedial); S.Rep. No. 100-4, p. 11 (1987) U.S.Code Cong. & Admin.News 1987, pp. 66, 76 (Committee Report stating that the DBE

provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons"), and the Government has so defended them in this case, Brief for Respondents 33. Since petitioner has not claimed the obsolescence of any particular fact on which the *Fullilove* Court upheld the statute, no issue has come up to us that might be resolved in a way that would render *Fullilove* inapposite. See, *e.g.*, 16 F.3d, at 1544 ("Adarand has stipulated that section 502 of the Small Business Act . . . satisfies the evidentiary requirements of *Fullilove*"); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment in No. 90-C-1413 (D.Colo.), p. 12 (*Fullilove* is not applicable to the case at bar because "[f]irst and foremost, *Fullilove* stands for only one proposition relevant here: the ability of the U.S. Congress, under certain limited circumstances, to adopt a race-base[d] remedy").

In these circumstances, I agree with Justice STEVENS's conclusion that stare decisis compels the application of *Fullilove*. Although *Fullilove* did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment.[1] *Fullilove*, 448 U.S., at

[1] If the statutes are within the § 5 power, they are just as enforceable when the National Government makes a construction contract directly as when it funnels construction money through the States. In any event, as Justice STEVENS has

477-478, 100 S.Ct., at 2774-2775 (opinion of Burger, C.J.); *id.*, at 503, 100 S.Ct., at 2787 (Powell, J., concurring); *id.*, at 520-521, 100 S.Ct., at 2796-2797 (Marshall, J., concurring in judgment). Once *Fullilove* is applied, as Justice STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in *Fullilove*), pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

The Court today, however, does not reach the application of *Fullilove* to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the *Fullilove* plurality, and without now trying to read the current congressional evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered *Fullilove*'s conclusion obsolete as judged under the *Fullilove* plurality's own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what *Fullilove* would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in

noted, it is not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely clear.

The result in *Fullilove* was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564, 110 S.Ct. 2997, 3008, 111 L.Ed.2d 445 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. *Fullilove, supra*, at 495-496, 100 S.Ct., at 2783 (concurring opinion) ("Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views"). Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451, 105 S.Ct. 3249, 3260, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring, joined by Burger, C.J.). Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory,

but fatal in fact.' *Fullilove, supra*, at 519 [100 S.Ct., at 2795-2796] (Marshall, J., concurring in judgment)"); see also *Missouri v. Jenkins*, 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact' ").

In assessing the degree to which today's holding portends a departure from past practice, it is also worth noting that nothing in today's opinion implies any view of Congress's § 5 power and the deference due its exercise that differs from the views expressed by the *Fullilove* plurality. The Court simply notes the observation in Croson "that the Court's 'treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here,' because *Croson*'s facts did not implicate Congress's broad power under § 5 of the Fourteenth Amendment," and explains that there is disagreement among today's majority about the extent of the § 5 power. There is therefore no reason to treat the opinion as affecting one way or another the views of § 5 power, described as "broad," "unique," *Fullilove*, 448 U.S., at 500, 100 S.Ct., at 2786 (Powell, J., concurring), and "unlike [that of] any state or political subdivision," *Croson*, 488 U.S., at 490, 109 S.Ct., at 720 (opinion of O'CONNOR, J.). See also *Jenkins, post*, at 113, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("Congress . . . enjoys ' "discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," ' *Croson*, 488 U.S., at 490, 109 S.Ct., at 720 (quoting *Katzenbach v. Morgan*, 384 U.S., at 651 [86 S.Ct., at 1723])"). Thus, today's decision should leave § 5 exactly where it is as the source of an interest of the National Government sufficiently

important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today's decision will necessarily have any effect on the resolution of an issue that was just as pertinent under *Fullilove*'s unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future' "), quoting *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). This is so whether the remedial authority is exercised by a court, *see ibid.*; *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430, 437, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968), the Congress, see *Fullilove, supra*, 448 U.S., at 502, 100 S.Ct., at 2787 (Powell, J., concurring), or some other legislature, see *Croson, supra*, 488 U.S., at 491-492, 109 S.Ct., at 720-721 (opinion of O'CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt

programs aimed at remedying the effects of past invidious discrimination. See, *e.g.*, *Jenkins*, 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) (noting the critical difference "between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this price is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in *Fullilove* that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S., at 513, 100 S.Ct., at 2792-2793.

Surely the transition from the *Fullilove* plurality view (in which Justice Powell joined) to today's strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by

which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in the District Court Adarand had chosen to press a challenge to the reasonableness of the burden of these statutes,[2] more than a decade after *Fullilove* had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

Justice GINSBURG, with whom Justice BREYER joins, dissenting.

For the reasons stated by Justice SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with Justice STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional

[2] I say "press a challenge" because petitioner's Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

authority to overcome historic racial subjugation." I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement – the common understandings and concerns – revealed in opinions that together speak for a majority of the Court.

I

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct.

[1] On congressional authority to enforce the equal protection principle, see, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 286, 85 S.Ct. 348, 373, 13 L.Ed.2d 258 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under § 5 of the Fourteenth Amendment, to "pu[t] an end to all obstructionist strategies and allo[w] every person – whatever his race, creed, or color – to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); *id.*, at 291, 293, 85 S.Ct., at 375, 377 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity"; "Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147-151 (12th ed. 1991).

1138, 41 L.Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." *Id.*, at 559, 16 S.Ct., at 1146 (dissenting opinion).

Not until *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." *Id.*, at 11, 87 S.Ct., at 1823.[2]

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress'

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[2] The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in *Loving*. See *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, vacated and remanded, 350 U.S. 891, 76 S.Ct. 151, 100 L.Ed. 784 (1955), reinstated and aff'd, 197 Va. 734, 90 S.E.2d 849, appeal dism'd, 350 U.S. 985, 76 S.Ct. 472, 100 L.Ed. 852 (1956). *Naim* expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S.E.2d, at 756.

authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race.[3] White and African-American consumers still encounter different deals.[4] People of color looking for housing still face discriminatory treatment by landlords, real estate agents,

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[3] See, *e.g.*, H. Cross, G. Kennedy, J. Mell, & W. Zimmermann, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90-4, 1990) (*e.g.*, Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, M. Fix, & R. Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91-9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

[4] See, *e.g.*, Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv.L.Rev. 817, 821-822, 819, 828 (1991) ("blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).

and mortgage lenders.[5] Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.[6] Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,[7] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally,

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[5] See, *e.g.*, A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds. 1989) ("[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses."); M. Turner, R. Struyk, & J. Yinger, U.S. Dept. of Housing and Urban Development, Housing Discrimination Study: Synthesis i-vii (Sept. 1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African-American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am.J.Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

[6] See, *e.g.*, *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

[7] Cf. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 318, 106 S.Ct. 1842, 1870, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); *Califano v. Goldfarb*, 430 U.S. 199, 222-223, 97 S.Ct. 1021, 1034-1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.[8]

II

The lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); for in that case, scrutiny the Court described as "most rigid," *id.*, at 216, 65 S.Ct., at 194, nonetheless yielded a pass for an odious, gravely injurious racial classification. A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.

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[8] On the differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group, see, *e.g.*, Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433-434 (1988) ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

For a classification made to hasten the day when "we are just one race," however, the lead opinion has dispelled the notion that "strict scrutiny" is " 'fatal in fact.' " (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519, 100 S.Ct. 2758, 2795-2796, 65 L.Ed.2d 902 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, *e.g., Hoyt v. Florida*, 368 U.S. 57, 60, 82 S.Ct. 159, 161-162, 7 L.Ed.2d 118 (1961) (upholding women's "privilege" of automatic exemption from jury service); *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking," "to 'differentiate between' permissible and impermissible governmental use of race," *ibid.*, to distinguish " 'between a "No Trespassing" sign and a welcome mat.' ".

Close review also is in order for this further reason. As Justice SOUTER points out, and as this very case shows, some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or

interfere too harshly with legitimate expectations of persons in once-preferred groups. See, *e.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (CA2 1973).

* * *

While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

U.S. Constitution, Fifth Amendment

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Surface Transportation and Uniform Relocation Assistance Act (STURAA), Section 106(c), 101 Stat. 132

(c) Disadvantaged Business Enterprises.

(1) *General rule.* – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) *Definitions.* – For purposes of this subsection –

(A) *Small Business Concern.* – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $14,000,000 as adjusted by the Secretary for inflation.

(B) *Socially and economically disadvantaged individuals.* – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

Intermodal Surface Transportation Efficiency Act (ISTEA), Section 1003(b), 105 Stat. 1919-1921

(1) *General rule.* – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I (other than part B), III, V, and VI of this Act [Pub. L. 102-240, Dec. 18, 1991, 105 Stat. 1914] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions. – For purposes of this subsection, the following definitions apply:

(A) *Small business concern.* – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $15,370,000, as adjusted by the Secretary for inflation.

(B) *Socially and economically disadvantaged individuals.* – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

(3) *Annual listing of disadvantaged business enterprises.* – Each State shall annually survey and compile a list of the small business concerns referred to in paragraph (1) and the location of such concerns in the State and notify the Secretary, in writing, of the percentage of such concerns which are controlled by women, by socially and economically disadvantaged individuals (other than women), and by individuals who are women and are also otherwise socially and economically disadvantaged individuals.

(4) *Uniform certification.* – The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment. analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

(5) *Study.* –

(A) In general. – The Comptroller General shall conduct a study of the disadvantaged business enterprise program of the Federal Highway Administration (hereinafter in this paragraph referred to as the "program").

(B) Contents. – The study under this paragraph shall include the following:

(i) Graduation. – A determination of –

(I) the percentage of disadvantaged business enterprises which have enrolled in the program and graduated after a period of 3 years;

(II) the number of disadvantaged business enterprises which have enrolled in the program and not graduated after a period of 3 years;

(III) whether or not the graduation date of any of the disadvantaged business enterprises described in subclause (II) should have been accelerated;

(IV) since the program has no graduation time requirements, how many years would appear reasonable for disadvantaged business enterprises to participate in the program;

(V) the length of time the average small nondisadvantaged business enterprise takes to be successful in the highway construction field as compared to the average disadvantaged business enterprise; and

(VI) to what degree are disadvantaged business enterprises awarded contracts once they are no longer participating in the disadvantaged business program.

(ii) Out-of-State contracting. – A determination of which State transportation programs meet the requirement of the program for 10 percent participation by disadvantaged business enterprises by contracting with contractors located in another State and a determination to what degree prime contractors use out-of-State disadvantaged business enterprises even when disadvantaged business enterprises exist within the State to meet the 10 percent participation goal and reasons why this occurs.

(iii) Program adjustments. – A determination of whether or not adjustments in the program could be made with respect to Federal and State participation in

training programs and with respect to meeting capital needs and bonding requirements.

(iv) Success rate. – Recommendations concerning whether or not adjustments described in clause (iii) would continue to encourage minority participation in the program and improve the success rate of the disadvantaged business enterprises.

(v) Performance and financial capabilities. – Recommendations for additions and revisions to criteria used to determine the performance and financial capabilities of disadvantaged business enterprises enrolled in the program.

(vi) Enforcement mechanisms. – A determination of whether the current enforcement mechanisms are sufficient to ensure compliance with the disadvantaged business enterprise participation requirements.

(vii) Additional costs. – A determination of additional costs incurred by the Federal Highway Administration in meeting the requirement of the program for 10 percent participation by disadvantaged business enterprises as well as a determination of benefits of the program.

(viii) Effect on industry. – A determination of how the program is being implemented by the construction industry and the effects of the program on all segments of the industry.

(ix) Certification. – An analysis of the certification process for Federal-aid highway and transit programs, including a determination as to whether the

process should be uniform and permit State-to-State reciprocity and how certification criteria and procedures are being implemented by the States.

(x) Goals. – A determination of how the Federal goal is being implemented by the States, including the waiver process, and the impact of the goal on those individuals presumed to be socially and economically disadvantaged.

(C) Report. – Not later than 12 months after the date of the enactment of this Act [Dec. 18, 1991], the Comptroller General shall transmit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a report on the results of the study conducted under this paragraph.

Transportation Equity Act for the Twenty First Century (TEA-21), Section 1101(b), Public Law 105-178

(b) Disadvantaged Business Enterprises. –

(1) *General rule.* – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) *Definitions.* – In this subsection, the following definitions apply:

(A) *Small business concern.* – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $16,600,000, as adjusted by the Secretary for inflation.

(B) *Socially and economically disadvantaged individuals.* – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

(3) *Annual listing of disadvantaged business enterprises.* – Each State shall annually survey and compile a list of the small business concerns referred to in paragraph (1) and the location of such concerns in the State and notify the Secretary, in writing, of the percentage of such concerns which are controlled by women, by socially and economically disadvantaged individuals (other than women), and by individuals who are women and are otherwise socially and economically disadvantaged individuals.

(4) *Uniform certification.* – The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

(5) *Compliance with court orders.* – Nothing in this subsection limits the eligibility of an entity or person to receive funds made available under titles I, III, and V of this Act, if the entity or person is prevented, in whole or in part, from complying with paragraph (1) because a Federal court issues a final order in which the court finds that the requirement of paragraph (1), or the program established under paragraph (1), is unconstitutional.

(6) *Review by comptroller general.* – Not later than 3 years after the date of enactment of this Act, the Comptroller General of the United States shall conduct a review of, and publish and report to Congress findings and

conclusions on, the impact throughout the United States of administering the requirement of paragraph (1), including an analysis of –

(A) in the case of small business concerns certified in each State under paragraph (4) as owned and controlled by socially and economically disadvantaged individuals –

(i) the number of the small business concerns; and

(ii) the participation rates of the small business concerns

in prime contracts and subcontracts funded under titles I, III, and V of this Act;

(B) in the case of small business concerns described in subparagraph (A) that receive prime contracts and subcontracts funded under titles I, III, and V of this Act –

(i) the number of the small business concerns;

(ii) the annual gross receipts of the small business concerns; and

(iii) the net worth of socially and economically disadvantaged individuals that own and control the small business concerns;

(C) in the case of small business concerns described in subparagraph (A) that do not receive prime contracts and subcontracts funded under titles I, III, and V of this Act –

(i) the annual gross receipts of the small business concerns; and

(ii) the net worth of socially and economically disadvantaged individuals that own and control the small business concerns;

(D) in the case of business concerns that receive prime contracts and subcontracts funded under titles I, III, and V of this Act, other than small business concerns described in subparagraph (B) –

(i) the annual gross receipts of the business concerns; and

(ii) the net worth of individuals that own and control the business concerns;

(E) the rate of graduation from any programs carried out to comply with the requirement of paragraph (1) for small business concerns owned and controlled by socially and economically disadvantaged individuals;

(F) the overall cost of administering the requirement of paragraph (1), including administrative costs, certification costs, additional construction costs, and litigation costs;

(G) any discrimination on the basis of race, color, national origin, or sex against small business concerns owned and controlled by socially and economically disadvantaged individuals;

(H) (i) any other factors limiting the ability of small business concerns owned and controlled by socially and economically disadvantaged individuals to compete

for prime contracts and subcontracts funded under titles I, III, and V of this Act; and

(ii) the extent to which any of those factors are caused, in whole or in part, by discrimination based on race, color, national origin, or sex;

(I) any discrimination, on the basis of race, color, national origin, or sex, against construction companies owned and controlled by socially and economically disadvantaged individuals in public and private transportation contracting and the financial, credit, insurance, and bond markets;

(J) the impact on small business concerns owned and controlled by socially and economically disadvantaged individuals of –

(i) the issuance of a final order described in paragraph

(5) by a Federal court that suspends a program established under paragraph (1); or

(i) the repeal or suspension of State or local disadvantaged business enterprise programs; and

(K) the impact of the requirement of paragraph (1), and any program carried out to comply with paragraph (1), on competition and the creation of jobs, including the creation of jobs for socially and economically disadvantaged individuals.

* * *

Small Business Act Section 8(d), 15 U.S.C. § 637(d)(1)-(3), (5), (6)

(d) Performance of contracts by small business concerns; inclusion of required contract clause; subcontracting plans; contract eligibility; incentives; breach of contract; review; report to Congress

(d)(1) It is the policy of the United States that small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

(d)(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which –

(2)(A) does not exceed the simplified acquisition threshold;

(2)(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto RICO; or

(2)(C) is for services which are personal in nature.

(d)(3) The clause required by paragraph (2) shall be as follows:

(3)(A) It is the policy of the United States that small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

(3)(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the

awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

(3)(C) As used in this contract, the term 'small business concern' shall mean a small business as defined pursuant to section 3 of the Small Business Act [15 U.S.C.A. 632] and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern –

(i) which is at least 51 per certum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C.A. 637(a)].

(3)(D) The term "small business concern owned and controlled by women" shall mean a small business concern –

(i) which is at least 51 per centum owned by one or more women; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more women; and

(ii) whose management and daily business operations are controlled by one or more women.

(3)(E) The term "small business concern owned and controlled by veterans" shall mean a small business concern –

(i) which is at least 51 per centum owned by one or more eligible veterans; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more veterans; and

(ii) whose management and daily business operations are controlled by such veterans. The contractor shall treat as veterans all individuals who are veterans within the meaning of the term under section 632(q) of this title.

(3)(F) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals, or a small business concern owned and controlled by women.

(3)(G) In this contract, the term "qualified HUBZone small business concern" has the meaning given that term in section 632(p) of this Title.

(4)(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may

exceed $1,000,000, in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

(4)(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which –

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts, and

(iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

(4)(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

(4)(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of the contract.

(4)(E) Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns, small business concerns owned and controlled by veterans, qualified HUBZone small business concerns, and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection and for small business concerns owned and controlled by women, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: Provided, That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(4)(F)(i) Each contract subject to the requirements of this paragraph or paragraph (5) shall contain a clause for the payment of liquidated damages upon a finding that a prime contractor has failed to make a good faith effort to comply with the requirements imposed on such contractor by this subsection.

(ii) The contractor shall be afforded an opportunity to demonstrate a good faith effort regarding compliance prior to the contracting officer's final decision regarding the imposition of damages and the amount thereof. The final decision of a contracting officer regarding the contractor's obligation to pay such damages, or the amounts thereof, shall be subject to the Contract Disputes Act of 1978 (41 U.S.C. 601->613).

(iii) Each agency shall ensure that the goals offered by the apparent successful bidder or offeror are attainable in relation to –

(I) the subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(II) the pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(III) the actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(4)(G) The following factors shall be designated by the Federal agency as significant factors for purposes of evaluating offers for a bundled contract where the head of the agency determines that the contract offers a significant opportunity for subcontracting:

(i) A factor that is based on the rate provided under the subcontracting plan for small business participation in the performance of the contract.

(ii) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the

offeror attained applicable goals for small business participation in the performance of contracts.

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which –

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities,

shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(5)(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract, Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include –

(6)(A) percentage goals for the utilization as subcontractors of small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women;

(6)(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(6)(C) a description of the efforts the offeror or bidder will take to assure that small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women will have an equitable opportunity to compete for subcontracts;

(6)(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(6)(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(6)(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; and efforts to identify and award subcontracts to such small business concerns.

Small Business Act, 15 U.S.C. § 644(g)(1)

(g) Goals for participation of small business concerns in procurement contracts

(1) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by qualified HUBZone small business concerns shall be established at not less than 1 percent of the total value of all prime contract awards for fiscal year 1999, not less than 1.5 percent of the total value of all prime contract awards for fiscal year 2000, not less than 2 percent of the total value of all prime contract awards for fiscal year 2001, not less than 2.5 percent of the total value of all prime contract awards for fiscal year 2002, and not less than 3 percent of the total value of all prime contract awards for fiscal year 2003 and each fiscal year thereafter. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract

awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

Resolution Number TC-554

WHEREAS, pursuant to sec. 43-1-106, C.R.S., the Transportation Commission of Colorado (the "Commission") is authorized to establish general policy for, and supervise the activities of, the Colorado Department of Transportation (CDOT), including CDOT's Disadvantaged Business Enterprises ("DBE") program; and

WHEREAS, since 1979, the Commission (then known as the Highway Commission) has established a DBE program which has included goals for DBE participation in state contracts; and

WHEREAS, on December 18, 1991, the federal Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 was enacted; and

WHEREAS, Section 1003(b) of ISTEA requires that no less than 10 percent of the funds authorized in the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals which are defined in regulations implementing ISTEA, 49 C.F.R. sec. 23.62 (1992); and

WHEREAS, the regulations implementing ISTEA allow recipients of federal funds to establish goals of less then 10 percent provided that justification is presented and approved; and

WHEREAS, based on a decade of hearings held on this subject, statistical and anecdotal evidence received by the Commission, the Commission's DBE and Social Responsibility policies, and in ISTEA, the Commission has set goals for projects involving state and federal funds; and

WHEREAS, the current state and federal goals are set at 10 percent based on evidence received by the Commission; and

WHEREAS, Adarand Constructors, Inc. ("Adarand") is a Colorado corporation engaged in the business of construction and installation of guard rail components of highway projects; and

WHEREAS, on June 2, 1997, Senior District Court Judge Kane issued a decision in Adarand Constructors, Inc. V. Pena, et al., C.A. NO. 90-K-1413 (D. Colo. 6/2/07), in which he held that the presumption of social and economic disadvantage for minorities and women found in ISTEA and in the federal regulations are unconstitutional and that a government must find that there has been discrimination against each individual DBE in order to withstand Constitutional muster; and

WHEREAS, it is the intent of the Commission to comply with the requirement of Judge Kane's opinion in CDOT's DBE program; and

WHEREAS, in furtherance of that intent, the Commission requests that CDOT modify CDOT's DBE program to require: (1) that DBE applicants certify that each of the company's majority owner(s) has experienced social disadvantage based upon the effects of racial, ethnic or gender discrimination as a prerequisite to certification for CDOT projects; (2) that CDOT require DBE applicants to submit a certification of the personal net worth of each of the majority owner(s) of the DBE; and (3) that a determination that the personal net worth of each of the majority owner(s) of a DBE applicant is less then $750,000, thus

showing economic disadvantage based upon federal standards, be a prerequisite to certification for CDOT projects.

NOW, THEREFORE BE IT RESOLVED as follows:

1. CDOT shall modify its DBE program to require that DBE applicants certify that the company's majority owner(s) have experienced social disadvantage based upon the effects of racial, ethnic or gender discriminations as a prerequisite to certification for CDOT projects.

2. CDOT shall modify its DBE program to require DBE applicants to submit a certification of the net worth of each majority owner(s) of the DBE, and to provide a determination that the personal net worth of each majority owner of a DBE applicant is less than $750,000, thus showing economic disadvantage based upon federal standards, be a prerequisite to certification for CDOT projects.

3. CDOT shall obtain a certification in compliance with the above requirements from all existing CDOT DBE's by October 1, 1997, and shall disqualify any existing DBE that does not continue to qualify as a DBE under the new standards for CDOT projects.

4. CDOT shall notify the Department of Regulatory Agencies, the certifying agency for CDOT, of these modifications.

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13 C.F.R. § 124.1002 (2000) What is a Small Disadvantaged Business (SDB)?

(a) Reliance on 8(a) criteria. In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. Qualified Private Certifiers must use the 8(a) criteria applicable to ownership and control in determining whether a particular firm is actually owned and controlled by one or more individuals claiming disadvantaged status.

(b) SDB eligibility criteria. A small disadvantaged business (SDB) is a concern:

(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit Standard Industrial Classification (SIC) code.

(i) For purposes of SDB certification, the applicable SIC code is that which relates to the primary business activity of the concern;

(ii) For purposes related to a specific Federal Government contract, the applicable SIC code is that assigned by the contracting officer to the procurement at issue;

(2) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals as set forth in § 124.105. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§ 124.109, 124.110, and 124.111, respectively.

(3) Except for tribes, ANCs, NHOs, and CDCs, whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§ 124.109, 124.110, and 124.111, respectively.

(4) Which, for purposes of SDB procurement mechanisms authorized by 10 U.S.C. 2323 (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides) relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) Disadvantaged status. In assessing the personal financial condition of an individual claiming economic disadvantage, his or her net worth must be less than $750,000 after taking into account the exclusions set forth in § 124.104(c)(2).

(d) Additional eligibility criteria. Except for tribes, ANCs, CDCs and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

(e) Potential for success not required. The potential for success requirement set forth in § 124.107 does not apply as an eligibility requirement for an SDB.

(f) Joint ventures. Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides), provided that the requirements set forth in this paragraph are met.

(1) The disadvantaged participant(s) to the joint venture must have:

(i) Received an SDB certification from SBA; or

(ii) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application.

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible to be certified as an SDB. The entity created by such a relationship would not be owned and controlled by one or more socially and economically disadvantaged individuals. Each contract for which a joint venture submits an offer will be evaluated on a case by case basis.

(3) Except as set forth in 13 CFR 121.103 (f) (3), a concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated with such other concern(s) for size purposes. If the exception does not apply, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(4) An SDB must be the managing venturer of the joint venture, and an employee of the managing venturer

must be the project manager responsible for performance of the contract.

(5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

(g) Ownership restrictions for non-disadvantaged individuals. The ownership restrictions set forth in § 124.105 (g) and (h) for non-disadvantaged individuals and concerns do not apply for purposes of determining SDB eligibility.

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13 C.F.R. § 124.104 (2000) Who is economically disadvantaged?

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(b) Submission of narrative and financial information.

(1) Each individual claiming economic disadvantage must describe it in a narrative statement, and must submit personal financial information.

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13 C.F.R. § 124.105 Social disadvantage.

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations. *see* § 124.112(a)

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Phillippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands. Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated

group if SBA has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(i) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(v) The individual's social disadvantage must have negatively impacted on his or he entry into and/or advancement in the business world. SBA will entertain any relevant evidence in assessing this element of an applicant's case. SBA will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(A) *Education.* SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions or higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(b) *Employment.* SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(C) *Business history.* SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

(d) *Socially disadvantaged group inclusion* – (1) *General.* Upon an adequate preliminary showing to SBA by representative of an identifiable group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER

a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.

(2) *Standards to be applied.* In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation. SBA shall determine:

(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish the notice described in paragraph (d)(1) of this section.

(3) *Procedure*. Once a notice is published under paragraph (d)(1) of this section. SBA shall adduce further information on the record of the proceeding which tends to support or refute the groups request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.

(4) *Decision*. Once SBA has published a notice under paragraph (d)(1) of this section, it shall afford a period of not more than thirty (30) days for public comment concerning the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings within such comment period. Thereafter, SBA shall consider all information received and shall render its final decision within 60 days of the close of the comment period. Such decisions shall be published as a notice in the FEDERAL REGISTER. Concurrent with the notice, SBA shall advise the petitioners of its final decision in writing. If appropriate, SBA shall amend this regulation accordingly.

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48 C.F.R. § 19.001 (2000) Definitions.

Concern, as used in this part, means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. "Concern" includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see 19.101) any business entity, whether organized for profit or not, and any foreign business entity; i.e., any entity located outside the United States, shall be included.

Fair market price, as used in this part, means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost (see 19.202-6).

HUBZone means a historically underutilized business zone, which is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation.

HUBZone small business concern means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA.

Industry, as used in this part, means all concerns primarily engaged in similar lines of activity, as listed

and described in the North American Industry Classification system (NAICS) manual (available via the Internet at http://www.census.gov/epcd/www/naics.html).

Labor surplus area means a geographical area identified by the Department of Labor in accordance with 20 CFR Part 654, Subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

Labor surplus area concern means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

Nonmanufacturer rule means that a contractor under a small business set-aside or 8(a) contract shall be a small business under the applicable size standard and shall provide either its own produce or that of another domestic small business manufacturing or processing concern (see 13 CFR 121.406).

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether

dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

Small disadvantaged business concern, as used in this part (except for 52.212-3(c) (2) and 52.219-1(b) (2) for general statistical purposes and 52.212-3(c) (7) (ii), 52.219-22(b) (2), and 52.219-23(a) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns), means an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition; and either –

(1) It has received certification as a small disadvantaged business concern consistent with 13 CFR part 124, subpart B; and

(i) No material change in disadvantaged ownership and control has occurred since its certification;

(ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed $750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c) (2); and

(iii) It is identified, on the date of its representation, as a certified small disadvantaged business (SDB) concern in the database maintained by the Small Business Administration (PRO-Net); or

(2) For a prime contractor, it has submitted a completed application to the Small Business Administration

or a private certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR part 124, subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since it submitted its application. In this case, a contractor must receive certification as an SDB by the SBA prior to contract award.

Very small business concern means a small business concern –

(1) Whose headquarters is located within the geographic area served by a designated SBA district; and

(2) Which, together with its affiliates, has no more than 15 employees and has average annual receipts that do not exceed $1 million.

Women-owned small business concern means a small business concern –

(a) Which is at least 51 percent owned by one or more women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(b) Whose management and daily business operations are controlled by one or more women.

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48 C.F.R. § 19.703 (2000) Eligibility requirements for participating in the program.

(a) To be eligible as a subcontractor under the program, a concern must represent itself as a small business, HUBZone small business, small disadvantaged business, or woman-owned small business concern.

(1) To represent itself as a small business, HUBZone small business, or women-owned small business concern, a concern must meet the appropriate definition in 19.001.

(2) In connection with a subcontract, or a requirement for which the apparently successful offeror received an evaluation credit for proposing one or more SDB subcontractors, the contracting officer or the SBA may protest the disadvantaged status of a proposed subcontractor. Such protests will be processed in accordance with 13 CFR 124.1015 through 124.1022. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as a small, small disadvantaged, or a woman-owned small business concern. The clause at 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting, requires the contractor to obtain representations of small disadvantaged status from subcontractors through use of a provision substantially the same as paragraph (b)(1)(i)

of the provision at 52.219-22, Small Disadvantaged Business Status. The clause requires the contractor to confirm that a subcontractor representing itself as a small disadvantaged business concern is identified by SBA as a small disadvantaged business concern by accessing SBA's database (PRO-Net) or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1601 through 121.1608. Protests challenging a subcontractor's small disadvantaged business representation shall be filed in accordance with 13 CFR 124.1015 through 124.1022.

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48 C.F.R. § 52.219-8 Utilization of small business concerns.

As prescribed in 19.708(a), insert the following clause:

Utilization of Small Business Concerns (Oct 1999)

(a) It is the policy of the United States that small business concerns, HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

(b) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the Contractor's compliance with this clause.

(c) Definitions. As used in this contract

(1) Small business concern means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

(2) HUBZone small business concern means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

(3) Small business concern owned and controlled by socially and economically disadvantaged individuals means a small business concern that represents, as part of its offer, that it meets the definition of a small disadvantaged business concern in 13 CFR 124.1002.

(4) Small business concern owned and controlled by women means a small business concern –

(i) Which is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(ii) Whose management and daily business operations are controlled by one or more women; and

(d) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern, a HUBZone small business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals, or a small business concern owned and controlled by women.

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49 C.F.R. § 23.41. General.

(a) *Responsibilities of applicants and recipients.*

* * *

(3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing all the elements set forth in §23.45. The program shall be submitted for approval to the DOT element concerned with the application for assistance or project approval.

(i) Applicants for Federal-aid highway program funds;

* * *

(b) *Approval requirement.* Applications and funding agreements are signed and authorizations to proceed are approved only after the applicant's MBE program has been approved by the Departmental element. This requirement applies to applications, authorizations to proceed requested by Federal-aid highway program recipients, and requests for draw downs from the U.S. Railway Association submitted 90 days or more following the effective date of this part.

(c) *Effect of agreement.* The MBE program, prepared by the applicant and the commitment made by the applicant to carry out the MBE program is incorporated into and becomes part of this agreement and subsequent financial assistance agreements. The agreement between the Department and the recipient shall contractually bind the recipient to the commitments made in the MBE program, as approved by the Department. Failure to keep these commitments shall be deemed noncompliance with

this part. Once submitted and approved, an MBE program is applicable to all DOT-assisted contracts solicited and let by the applicant after the approval date of the MBE program regardless of the approval date of the grant or project under which the contracts are let.

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49 C.F.R. § 23.64 Submission of overall goals.

(a) Each recipient of funds to which this subpart applies that is required to have an MBE program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.

* * *

(c) Each recipient of Federal-aid highway funds, urban mass transportation funds, or airport funds shall submit its overall goal to FHWA or UMTA or FAA, as appropriate, for approval 60 days before the beginning of the Federal fiscal year to which the goal applies. An UMTA or FAA recipient calculating its overall goal as a percentage of funds for a particular grant, project, or group or grants or projects shall submit its overall goal to UMTA or FAA at a time determined by the UMTA or FAA Administrator.

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49 C.F.R. § 23.68 Compliance.

(b) Failure of a recipient to have an approved MBE program, including an approved overall goal, as required by § 23.64 of this subpart, is noncompliance with this subpart.

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49 C.F.R. Part 23, App. A to Subpart D

Relationship Between Subpart D and the Remainder of 49 CFR Part 23

In order to prevent uncertainty, the Department wishes to restate the relationship between subpart D and the remainder of 49 CFR part 23. Under 49 CFR part 23, certain recipients are required to have MBE programs. It is only these recipients who are required to follow the provisions of subpart D. Recipients who must implement subpart D do so only with respect to their FHWA and UMTA programs cited in subpart D. For example, a state department of transportation receiving funds from FHWA, UMTA, NHTSA, FRA, and FAA would be required to follow the subpart D goal procedures with respect only to its FHWA and UMTA funds. It would not be required to do so for its FAA, NHTSA, and FRA funds. The recipient would continue to follow all applicable procedures of 49 CFR part 23 with respect to the FAA, FRA, and the NHTSA funds.

With respect to FHWA and UMTA-assisted programs, recipients will now set only one DBE goal, at both the overall and contract goal level. There are no longer separate DBE and WBE goals. Rather, the single DBE goal applies to all DBEs, whether they are owned and controlled by minorities or by women.

The contract award procedures of 49 CFR part 23 apply to contracts under subpart D just as they do to contracts under other provisions of 49 CFR part 23. Recipients may award contracts to those successful bidders who meet contract goals or demonstrate that they made good faith efforts to do so.

Recipients must certify the eligibility of firms to participate under subpart D programs just as they do with respect to programs covered by other provisions of 49 CFR part 23. For businesses owned and controlled by members of the presumptive groups listed in the definition of socially and economically disadvantaged individuals in subpart D, the certification process is, with one exception, exactly the same as the certification process that has existed all along under 49 CFR part 23. The exception is that individuals with origins in Burma, Thailand, and Portugal are presumed to be socially and economically disadvantaged. They can be eligible under subpart D only if they successfully demonstrate to the recipient that they are socially and economically disadvantaged as individuals.

However, businesses owned and controlled by individuals with origins in these countries continue to be eligible minority businesses under other provisions of 49 CFR part 23. The result is that these firms may be certified for participation in FAA, FRA, NHTSA, or other DOT-assisted programs as before, but must make an individual showing of social and economic disadvantage in order to be regarded as eligible to participate in FHWA and UMTA programs as disadvantaged businesses. The same requirement for an individual determination of social and economic disadvantage applies to any individual who is not a member of one of the presumptive groups, such as a nonminority woman, a handicapped person, etc.

Decertification Procedures

Substantial concern has been expressed about the infiltration of DOT-assisted programs by "fronts" – businesses that claim to be owned and controlled by minorities, women, or other disadvantaged individuals, but which, in fact are ineligible for participation is DOT-assisted programs as MBEs, WBEs or disadvantaged businesses.

The Department wants to take this opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR part 23 participate as MBEs. WBEs, or disadvantaged businesses is DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible. A firm's circumstances, organization, ownership or control can change over time, resulting in a once-eligible firm becoming ineligible. A second look at a firm previously found to be eligible may reveal factors leading, on renewed consideration, to a determination that it is ineligible.

49 CFR part 23 does not, as presently drafted, prescribe any particular procedures for actions by recipients to remove the eligibility of firms that they have previously treated as eligible. When a recipient comes to believe that a firm with a current certification is not eligible, the Department recommends that the recipients

take certain steps before removing the firm's eligibility. The recipient should inform the firm in writing of its concerns about the firm's eligibility, give the firm an opportunity to respond to these concerns in person and in writing, and provide the firm a written explanation of the reasons for the recipient's final decision. This process may be brief and informal. For example, the firm's opportunity to respond to the recipient's concerns need not involve a formal court-type hearing. However, in the interest of ensuring that eligibility removal decisions are made fairly, these steps should take place before a firm's eligibility is removed. The Department believes that such a procedure in so-called "decertification" cases will make the procedure fairer and better administratively, as well as help prevent unnecessary procedural litigation. Procedures of this kind are not a regulatory requirement, but the Department believes that, as a matter of policy, that they are advisable for recipients to use.

Once a recipient has made a final decision on certification, that determination goes into effect immediately with respect to the recipient's DOT-assisted contracts (see § 23.53(g)). If a firm that has been denied certification or has been decertified appeals the recipient's action to the Department under § 23.55, or if a third party challenges the recipient's decision to certify the firm under § 23.55, the recipient's action remains in effect until and unless the Department makes a determination under § 23.55 reversing the recipient's action. The recipient's action is not stayed during the pendancy of a § 23.55 appeal.

For example, if a recipient has decertified a firm and the firm appeals the decertification to DOT, the firm remains ineligible for consideration as a disadvantaged

business with respect to the recipient's DOT-assisted programs until and unless the Department finds that the firm is eligible. Likewise, if the recipient has certified the firm as eligible, the firm remains eligible while the Department's consideration of a third party's challenge to its eligibility is pending. The Department has followed this policy and interpretation of its regulations consistently under the existing rule, and we will continue to do so with respect to subpart D.

There is only one exception to this rule, Section 23.55(c) provides that, in appropriate cases, the Secretary may deny the firm in question eligibility to participate as an MBE (or disadvantaged business) on DOT-assisted contracts let during the pendancy of the investigation, after providing the firm an opportunity to show cause by written statement to the Secretary why this should not occur. This paragraph is intended, and has been consistently interpreted and applied by the Department, to cover only a situation in which the recipient has decided that a firm is eligible and a third party has challenged the correctness of the recipient's determination. As a matter of policy, the Department believes that the award of contracts to ineligible firms is a very serious blow to the integrity of the Department's program. Consequently, if it appears to the Department that a challenged firm's eligibility is in serious doubt, the Department, under § 23.55(c), can administratively "enjoin" the firm's participation pending a final determination on the merits of the challenge to its certification. This provision does not, however, authorize the Department to maintain a firm's certification in effect pending the outcome of the § 23.55

Appeal, when the recipient has refused to certify or has decertified the firm.

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49 C.F.R. Part 23, App. C. to Subpart D:

Elements of Social Disadvantage. In order to determine that an individual is socially disadvantaged, the recipient must conclude that the individual meets the following standards: (i) The individual's social disadvantage must stem from his or her color, national origin, gender, physical handicap; long term residence in an environment isolated for the mainstream of American society; or other similar causes beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors, which are common to small business persons who are not socially disadvantaged. For example, because of their marginal financial status, many small businesses have difficulty obtaining credit through normal banking channels an individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes – not simply on the individual's or the firm's marginal financial status. (ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a nondesignated group, which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be. In assessing such facts, the recipient should place substantial weight on

prior administrative or judicial findings of discrimination experienced by the individual such findings, however, are not necessarily conclusive evidence of an individual's social disadvantage; nor are they a prerequisite for establishing social disadvantage. (iii) The individual's social disadvantage must be rooted in treatment, which he or she has experienced in American society, not in other countries. (iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant. Typically a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. (v) The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world.

The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. For example, the recipient should place little weight on annoying incidents experienced by the individual which have had little or no impact on the person's career or business development. On the other hand, the recipient should place greater weight on concrete occurrences which have tangibly disadvantaged an individual in the business world.

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49 C.F.R. Part 23, Subpart F – Compliance and Enforcement

Sec. 26.107 What enforcement actions apply to firms participating in the DBE program?

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or other violates applicable Federal statutes.

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49 C.F.R. Part 23, Subpart B – Administrative Requirements for DBE Programs for Federally-Assisted Contracting

Sec. 26.21 who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA recipients receiving funds authorized by a statute to which this part applies;

(2) FTA recipients that receive $250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year;

(3) FAA recipients that receive a grant of $250,000 or more for airport planning or development.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

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49 C.F.R. § 26.3 (2000) To whom does this part apply?

* * *

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

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49 C.F.R. § 26.51 (2000) What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means

and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

Example to Paragraph (f) (1): Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to Paragraph (f) (2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the

remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f) (3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year. Example to Paragraph (f) (4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in §26.11.

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49 C.F.R. Part 23, Subpart D – Certification Standards

Sec. 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in Sec. 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see Sec. 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

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49 C.F.R. § 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of $16.6 million. The Secretary adjusts this amount for inflation from time to time.

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49 C.F.R. § 26.67 (2000) What rules determine social and economic disadvantage?

* * *

(b) Rebuttal of presumption of disadvantage.

(1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

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49 C.F.R. § 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(c) DOT directive to initiate proceeding. (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

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49 C.F.R. Part 26, Appendix E – Individual Determinations of Social and Economic Disadvantage

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

Social disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows

disadvantage in entering into or advancing in the business world.

(1) Education. Recipients will consider such factors as denial or equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) Employment. Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) Business history. The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in

recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities – especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments) – may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBE's and applicants.

Defendants' Memorandum in Support of
Their Motion for Summary Judgment,
Civil Action No. 90-K-1413, filed May 1, 1996,
U.S. District Court for the District of Colorado

APPENDIX I

1. The Small Business Act

Prior to the 1978 amendments to the SBA, discussed below, Congress had experience with the Public Works Employment Act (PWEA) of 1977, which was challenged and found constitutional in *Fullilove*. Congress created section 103(f) (2) of PWEA, which channeled subcontracting funds to minority-owned businesses, because it determined that qualified minority-owned businesses were disproportionately excluded from the nation's procurement activities and, in particular, from direct federal procurement and on federally-assisted programs. The Supreme Court in *Fullilove* emphasized the stubborn history of racial discrimination in the U.S. in contracting, and noted that Congress's decision to enact the PWEA was based on such findings. A House of Representatives report states:

> The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not

> participated to any measurable extent, in our total business system generally.

Summary of Activities, A Report of the House Committee on Small Business, 94th Cong., 2d Sess. (1977) 182 (summarizing H.R. Rep. No. 94-468 (1976) 17 (cited in *Fullilove*, 448 U.S. at 466 n.48 (opinion of Burger, C.J.).

The legislative history of the Small Business Act is also directly relevant here. It is concerned with developing small businesses, including businesses owned by socially and economically disadvantaged individuals, and providing them with opportunities to participate in the nation's economy, including the construction industry and other areas affected by government procurement. The Small Business Act first made express reference to race in the 1978 Amendments to the statute, Pub. L. No. 95-507, §§ 201, 211, 92 1760, 1767. However, prior to that, a 1975 report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Comm. on Small Business concluded that:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system. . . . These statistics [showing that minorities comprise 16% of the U.S. population, but only 3% of U.S. businesses] are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation the congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons

> to a level where they may effectively participate in the business mainstream of our economy.

Fullilove, 448 U.S. at 465-66 (opinion of Burger, C.J.) (citing H.R. Rep. No. 94-468, pp. 1-2 (1975)).

In 1978, Representative Addabo, the floor manager of the House bill to amend the Small Business Act, noted that "our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantage of persons identified by society as members of those groups."[1] Senator Nunn, who managed the bill in the Senate, also emphasized that "(b)ecause of present and past discrimination many minorities have suffered social disadvantagement." *Id.* at 35, 304.

The 1978 codification of amendments to the Act "establish[ed] the policy goal of developing businesses owned by socially and economically disadvantaged persons [and recognized] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunities to participate fully in the free enterprise system." S. Rep. No. 1070, 95th Cong., 2d Sess. 14 (1978). The final version of Pub. L. 95-507 makes the following findings:

> (2) many . . . persons are socially and economically disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control (3) that such groups

[1] 124 Cong. Rec. 34, 097 (1978).

> include, but are not limited to, Black Americans, Hispanic Americans, and other minorities.

15 U.S.C. 631(f) (1) (B), (C).

Since 1978, Congress has often reexamined the issue of disadvantage in federal contracting caused by racial discrimination and found that those disadvantages continue. Evidence presented before the House Comm. on Small Business in 1981 confirmed that minority firms continued to suffer discrimination in obtaining bonding for construction projects, securing adequate financing and credit terms, and receiving prompt payment by prime contractors for completed work.[2] In addition, the hearings included testimony about the negative perception by some in the public and private sectors as to the skills and competence of minorities and disadvantaged businesses, and criticism that federal agencies were not fully promoting the utilization of SDBs by prime contractors, which prevented minority and small firms from becoming viable, competitive businesses.[3] Other hearings held between 1981 and 1988 similarly evidenced the continuing difficulty experienced by individuals suffering from social and economic disadvantage in establishing small businesses after years of discrimination.[4]

[2] *See* Small and Minority Business in the Decade of the 1980's Pt. 1, House Comm. on Small Business, 97th Cong., 1st Sess. (1981) [hereinafter "Decade of the 1980's"]; *see also* Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Comm. on Small Business, 97th Cong., 2d. Sess. (1982).

[3] "Decade of the 1980's" at 106, 114, 118, 120-21, and 241.

[4] *See e.g.*, Surety Bonds and Minority Contractors, Hearing before the House Subcomm. on Commerce, Consumer

In 1988, Congress passed a substantial revision of the 8(a) program, 15 U.S.C. § 637(a), reaffirming its

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Protection and Competitiveness of the Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988) (examining the difficulties that minority-owned businesses experience in getting private sector bonding); Twenty Years after the Kerner Commission: The Need for a New Civil Rights Agenda, hearing before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 120th Cong., 2nd Sess. (1988); The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business, 100th Cong., 2d Sess. (1988); Small Business Problems, Hearings before the House Comm. on Small business, 100th Cong., 1st Sess. (1987); Minority Business Development Act, hearing before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business, 101st Cong., 1st Sess (1987); A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the House Subcomm. on Procurement, Innovation, and Minority Enterprise Development, Committee on Small Business, 100th Cong., 1st Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Small Business Comm., 100th Cong., 1st Sess. (1987); Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Comm. on Small Business, 99th Cong., 2d Sess. (1986); Hearings on the State of Hispanic Small Business in America Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985); Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business, 98th Cong., 1st Sess. (1983); Small Business and the Federal Procurement System, Hearings Before the Subcomm. on General Oversight, House Committee on Small

commitment to the elimination of discriminatory barriers faced by small businesses owned by disadvantaged individuals. The House Comm. on Small Business specifically found that "discrimination and the present effects of past discrimination" continued to hinder minority business development, and that an increase in the effectiveness of the SBA was necessary "to redress the effects of discrimination on entrepreneurial endeavors." H.R. Rep. No. 460, 100th Cong., 1st Sess. 16, 18 (1987). Congress was particularly concerned about the statistical disparities that demonstrated that the 8(a) program had made little progress in removing discriminatory barriers to minority business success.

The House Report noted:

> [O]nly six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percent for nonminorities is over six percent; and the average receipts per minority firm is less than 10 percent the average receipts of all businesses.

Federal procurement data revealed a similar pattern. In 1986, total prime contracts approached $185 billion, yet minority businesses received only $5 billion in prime

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Business, 97th Cong., 12st Sess. (1981); To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. (1980). The evidence produced at these hearings is similar to the evidence that Congress considered previously, discussed by Chief Justice Burger in *Fullilove*, 448 U.S. at 456-472.

contracts, or about 2.7 percent of the prime contract dollar.[5] Echoing the observations of a decade earlier, the Committee Report concluded that the disparity between minority and nonminority business participation in the economy and in federal procurement was "not the result of random chance," but that "discrimination and the present effects of past discrimination have hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors." H.R. Rep. No. 460 at 18.

Between 1988 and the present, Congress has held numerous hearings and received annual reports from the SBA that reveal continued barriers for disadvantaged businesses in contracting, such as the difficulty in securing bank loans and bonding insurance.[6] SBA annual

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[5] H.R. Rep. No. 460 at 18. *See also* Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Comm. on Small Business, 100th Cong., 2d Sess. 8 (1988).

[6] For examples of Congressional review since the passage of the 1988 amendments, *see* The SBA's 8(a) Minority Business Development Program, Hearing before the Senate Comm. on Small Business, 104th Cong., 1st Sess. (1995) (testimony of the National Federation of 8(a) Companies Exh. 2); Discrimination in Surety Bonding, Hearing Before the House Subcommittee on Minority Enterprise, Finance and Urban Development of the Comm. on Small Business, 103rd Cong., 1st Sess. (1993); Department of Defense: Federal Programs to Promote Minority Business Development, Hearing before the Subcommittee on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business, 103rd Cong., 1st Sess. (1993); SBA's Minority Business Development Program, Hearing Before the House Comm. on Small Business, 103rd Cong., 1st Sess. (1993) (hearing to discuss reforms to SBA's 8(a) program); Government Accounting Office Report, Problems Continue

reports to Congress and the President reveal a continuing need for remedial programs to address the significant disparities between minority and nonminority businesses, even after controlling for the amount of start-up capital, education, age, and previous experience. *See The State of Small Business – 1993* at 340-347.

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with SBA's Minority Business Development Program (Sept. 1993); Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts, Hearing Before the House Subcomm. on Commerce, Consumer and Monetary Affairs of the Committee on Government Operations, 103rd Cong., 1st Sess. (1993); Small Business Development, Hearing Before the House Subcomm. on Procurement, Tourism and Rural Development of the Comm. on Small Business, 102nd Cong., 2d Sess. (1992); Fiscal Economic and Social Crises Confronting American Cities, Hearings before the Senate Comm. on Banking, Housing, and Urban Affairs, 102nd Cong., 2nd Sess. (1992); Federal Minority Business Programs, Hearing before the House Comm. on Small Business, 102nd Cong., 1st Sess. (1991); The Meaning and Significance for Minority Business of the Supreme Court Decision in the *City of Richmond v. J.A. Croson*, Hearing before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 101st Cong. 2nd Sess. (1990); *City of Richmond v. J.A. Croson*: Impact and Response, Hearing before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. of Small Business United States Senate, 101st Cong., 2nd Sess. (1990); Minority Construction Contracting, Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the Comm. on Small Business, 101 Cong., 1st Sess. (1989) (examination of minority and women's subcontracting opportunities in federal construction projects); Implementation of Small Business Subcontracting Program, Hearing Before the House Comm. on Small Business (1988); Implementation of Small Business Subcontracting Program, Hearing Before the House Comm. on Small Business (1988).

2. STAA, STURAA and ISTEA

In 1982, Congress enacted section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA), 96 Stat. 2100, establishing a 10% goal for subcontracting opportunities on federally assisted DOT mass transit and highway construction projects. That provision was introduced as an amendment to STAA by Representative Mitchell, who sought to include the provision in the bill to ensure "the participation of [disadvantaged] businesses in these massive public spendings." 128 Cong. Rec. 28, 927 (1982). After the passage of Section 105(f), congress reviewed the effect that the provision was having on improving contracting opportunities for small DBEs.[7] Congress also held numerous hearings on discrimination in the federal contracting industry, and further evaluated the continuing need for remedial measures.[8] Thus, when

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[7] *Review of the 10-Percent Set Aside Program, Section 105(f) of the Surface Transportation Assistance Act of 1982*, House Comm. on Small Business, 98th Cong., 2d Sess. (1984); *Implementation of the Surface Transportation Assistance Act of 1982, Senate Comm. on the Environment and Public Works*, 98th Cong., 2d Sess. (1984); *Review of 10-Percent Set Aside Program (Section 105(f)) of the Surface Transportation Assistance Act of 1982*, House Comm. on Small Business, 99th Cong., 1st Sess. (1985); *Minority Business Participation in Department of Transportation Projects*, House Comm. on Government Operations, 99th Cong., 1st Sess. (1985); *see also Surface Transportation Issues*, House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. (1984).

[8] *See The Disadvantaged Enterprise Program of the Federal Aid Highway Act*, Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 10 (1985); *Minority Business Participation in Department of Transportation Projects*, Hearing Before a Subcomm. of the House Comm. on Government Operations,

Congress reauthorized the DOT DBE program in Section 106(c) the Surface Transportation and Uniform Relocation Assistance Act (STURAA), Pub. L. No. 100-17, in 1987, it had compiled ample evidence showing a compelling need to remedy the effects of past and ongoing discrimination that otherwise foreclosed small minority owned businesses from fully participating in public construction contracting opportunities. The Senate Report accompanying that bill noted:

> The Committee has considered extensive testimony and evidence on the bill's DBE (disadvantaged business enterprise) provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway industry and mass transit construction industry * * * [B]arriers still remain, preventing minorities and women from successfully competing in the industry. Moreover, the Committee has concluded that the findings adopted by Congress in 1978 when enacting legislation covering projects under the Small business Act, 15 U.S.C. § 631(e), apply equally to the federally-funded highway and mass transit construction projects covered by this bill.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987).

The Dot DBE provision was again reviewed by Congress and reauthorized in 1991. *See* Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No.

99th Cong., 1st Sess. 179 (1985); *Small and Minority Business in the Decade of the 1980's, Part 1*, House Comm. on Small Business, 97th Cong., 1st Sess. (1981).

102-240. Congress regularly revisits the issues that concern barriers to DBE entry in the construction industry and in the federal procurement arena, and has determined that continuing remedial efforts are needed.[9]

Annual reports compiled by the Department of Commerce's (DOC) Minority Business Development Agency (MBDA) also bear out Congress's continuing concerns over the difficulties that disadvantaged businesses have in securing federal procurement contracts. For instance, in 1977, minority owned businesses received only 1.45% of federal procurement contracting dollars. Federal Agency Performance for Minority Business Development, Fiscal Year 1984 (DOC, MBDA) at Table 4. By 1982, when STAA was enacted, that percentage of procurement dollars received by minority owned businesses had risen to only 3.21%. *Ibid.* In the ten year period since then, the percentage of procurement dollars received by minority

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[9] Some of the more recent hearings include the following: *Subcontracting with Small and Disadvantaged Businesses: GSA Oversight*, House Comm. on Government Operations, 100th Cong., 2d Sess (1988); *Surety Bonds and Minority Contractors*, House Comm. on Energy and Commerce, 100th Cong., 2d Sess (1988); *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects*, House Comm. on Government Operations, 100th Cong., 2d Sess (1988); *Disadvantaged Business Set-Asides in Transportation Construction Projects*, House Comm. on Small Business, 100th Cong., 2d Sess. (1988); *Problems with Equal Employment Opportunity and Minority and Women Contracting at Federal Agencies*, House Comm. on Banking, Finance and Urban Affairs, 102d Cong., 2d Sess. (1992); *Discrimination in Surety Bonding*, House Comm. on Small Business, 103d Cong., 1st Sess. (1993); *Access to Credit in Distressed Communities*, House Comm. on Small Business, 103d Cong., 1st Sess. (1993).

owned businesses has steadily risen; 3.62% in 19984 [sic], 4.04% in 1987, 5.12% in 1990, and 6.44% by 1992. Federal Agency Performance for Minority Business Development, Fiscal Year 1992 (DOC, MBDA) at Table 5.

While the dollar volume going to minority owned businesses has been growing, it has not kept pace with the increase in the number of such businesses over time. The SBA reported in 1987 that there were 1.2 million minority owned businesses, with total receipts of $77.8 billion. *The State of Small Business: A Report to the President* at 334[10] These figures represent 8.9% of all businesses, but only 3.9% of the receipts of all businesses. *Ibid.* See also *The State of Small Business: A Report to the President* at 228-229 (reports that in fiscal year 1989, minority owned businesses accounted for only 3.1% of the dollar volume of all federal contracts). In 1992, reported the SBA, minority owned businesses were 9% of the business population but received only 4.1% of the federal dollars spent that year. *The State of Small Business: A Report to the President* at 362.

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[10] This SBA survey of minority owned businesses (SMOBE) is a special program conducted by the U.S. Bureau of the Census. The coverage of the census bureau survey is restricted, however, to small businesses, such as sole proprietorships, partnerships and subchapter S corporations. The survey does not include regular (1120C) corporations, which tend to be the largest of businesses. See 1992 Report on the State of Small Business at 332-333.

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In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

RODNEY E. SLATER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve the compelling governmental interest of remedying the effects of racial discrimination that impede the ability of socially and economically disadvantaged individuals to participate in opportunities created by government contracting.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	13
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Skinner*, 790 F. Supp. 240 (D. Colo. 1992)	4
Adarand Constructors, Inc. v. *Peña*, 16 F.3d 1537 (10th Cir. 1994)	4
Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995)	1-2, 4, 9, 13, 14, 15, 20, 27
Adarand Constructors, Inc. v. *Slater*, 528 U.S. 216 (2000)	8, 27, 29
Associated Gen. Contractors v. *Drabick*, 214 F.3d 730 (6th Cir. 2000), petition for cert. pending, No. 00-976	30
Bush v. *Vera*, 517 U.S. 952 (1996)	14
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	27
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	11-12, 15, 18, 20, 21
Contractors Ass'n of E. Pa. v. *City of Phila.*, 91 F.3d 586 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997)	30
DeShaney v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)	27
Diffenderfer v. *Central Baptist Church*, 404 U.S. 412 (1972)	26
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	15

Cases—Continued: Page

Interstate Traffic Control v. *Beverage*, 101 F. Supp. 2d 445 (S.D. W. Va. 2000) 19
McCray v. *New York*, 461 U.S. 961 (1983) 17
Monterey Mech. Co. v. *Wilson*, 125 F.3d 702 (9th Cir. 1997) 30
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 15
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) 23, 26
United States v. *Paradise*, 480 U.S. 149 (1987) 11, 24
United States v. *Salerno*, 481 U.S. 739 (1987) 28
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 27

Constitution, statutes and regulations:

U.S. Const.:
Amend. V 4
Amend. XIV 4
§ 5 15
Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921 ..... 3, 29
Small Business Act, 15 U.S.C. 631 *et seq.* 2
§ 8(a)(5), 15 U.S.C. 637(a)(5) 2, 18
§ 8(a)(6)(A), 15 U.S.C. 637(a)(6)(A) 3, 18
§ 8(d), 15 U.S.C. 637(d) 11, 28, 29
§ 8(d)(1), 15 U.S.C. 637(d)(1) (1994 & Supp. IV 1998) 29
§ 15(g)(1), U.S.C. 644(g)(1) (1994 & Supp. IV 1998) 2
Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 2
§ 106(c)(1), 101 Stat. 145 2
§ 106(c)(2)(B), 101 Stat. 146 3
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Tit. I, 112 Stat. 107:
§ 1101(b), 112 Stat. 113-115 ..... 3, 9

Statutes and regulations—Continued: Page

§ 1101(b)(1), 112 Stat. 113 ..... 5, 15, 28
§ 1101(b)(6), 112 Stat. 114 ..... 17, 26
42 U.S.C. 2000d *et seq.* 4
13 C.F.R. 124.105(c)(1) 12
49 C.F.R. Pt. 26 2
Section 26.15 (Preamble) 25
Section 26.15 ..... 7, 11, 25
Section 26.15(a) 7
Section 26.26(b) 19
Section 26.33 25
Section 26.33(a) 12
Section 26.41(c) 7, 25
Section 26.43 7
Section 26.45 ..... 7, 25
Section 26.45(c) 23, 25
Section 26.45(d) 25
Section 26.47 7
Section 26.51(a) 8, 10, 25
Section 26.51(b) 8, 11
Section 26.51(d) 8, 25
Section 26.51(f)(1) 8
Section 26.53 8
Section 26.61(d) 12
Section 26.65 ..... 24, 25
Section 26.67 ..... 24, 25, 29
Section 26.67(a) 13, 18, 23
Section 26.67(a)(1) 3, 6
Section 26.67(a)(2) 3, 18
Section 26.67(a)(2)(i) 6
Section 26.67(b) 3
Section 26.67(b)(1) 6, 29
Section 26.67(b)(2) 7
Section 26.67(d) 7

Regulations—Continued:	Page
Section 26.87	4, 6, 19
Section 26.107(e)	18
App. E	3
Miscellaneous:	
144 Cong. Rec. (daily ed. Mar. 5, 1998):	
p. S1401	22
p. S1404	5
p. S1409	5, 6, 16, 23
pp. S1409-S1410	5, 22
p. S1413	5
p. S1420	5, 22
p. S1422	5
pp. S1423-S1425	6, 16, 23
pp. S1429-S1430	5
pp. S1430-S1431	6, 16, 23
144 Cong. Rec. (daily ed. Mar. 6, 1998):	
p. S1482	5, 22
pp. S1485-S1486	6, 16, 23
p. S1496	5
p. H2011 (daily ed. Apr. 1 1998)	5
pp. S5413-5414 (daily ed. May 22, 1998)	6, 16, 23
61 Fed. Reg. 26,050-26,063 (1996)	9, 24
64 Fed. Reg. (1998):	
p. 5096	2
p. 5098	3
pp. 5100-5102	5
pp. 5101-5103	2
pp. 5102-5103	7
pp. 5107-5108	7
p. 5117	3
p. 5129	2
pp. 5136-5137	3
p. 5142	4
H.R. Rep. No. 550, 105th Cong., 2d Sess. (1998)	6, 16, 23
S. Rep. No. 4, 100th Cong., 1st Sess. (1987)	28

In the Supreme Court of the United States

No. 00-730

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

RODNEY E. SLATER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-98) is reported at 228 F.3d 1147. The opinion of the district court (Pet. App. 128-201) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a set of federal statutes and regulations that constitute the Disadvantaged Business Enterprise (DBE) program of the U.S. Department of Transportation (DOT). That program provides opportunities for socially and economically disadvantaged business enterprises to participate in federally-aided highway and transit programs. The DOT's current DBE program differs substantially from the program that was in effect when this Court first reviewed this case in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S.

200 (1995). Many of the changes to the program were made in response to the Court's *Adarand* decision. See 64 Fed. Reg. 5096, 5101-5103, 5129 (1999); 49 C.F.R. Pt. 26.

1. This case arose out of the now-discontinued Subcontractor Compensation Clauses or SCCs formerly used by the Federal Highway Administration (FHWA), an agency of the DOT, in contracts for highway construction on federal lands. As originally conceived and employed, SCCs provided financial incentives for prime contractors to subcontract with DBEs. See *Adarand*, 515 U.S. at 209. They thus enabled the DOT to satisfy certain objectives under the Small Business Act (SBA), 15 U.S.C. 631 *et seq.*, and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132. See *Adarand*, 515 U.S. at 209. The SCCs were designed to help achieve a federal government-wide goal, established by the SBA, that small disadvantaged businesses participate in at least "5 percent of the total value of all prime contract and subcontract awards." 15 U.S.C. 644(g)(1) (1994 & Supp. IV 1998). And they were to help the DOT meet the goal, set by the STURAA, for DBE participation in highway construction on federal lands. Under Section 106(c)(1) of the STURAA, "not less than 10 percent" of the funds authorized by the STURAA are to "be expended with small business concerns owned and controlled by" socially and economically disadvantaged individuals, unless the Secretary of Transportation in his or her discretion determines otherwise. 101 Stat. 145. The five and ten percent participation levels are aspirational goals; they are not mandatory participation requirements.

Under Section 8 of the SBA, an individual is "[s]ocially disadvantaged" if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to * * * individual qualities." 15 U.S.C. 637(a)(5). An individual is considered "[e]conomically disadvantaged" if his or her "ability to compete in the free enterprise system has been

impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). See also 49 C.F.R. Pt. 26, App. E (definitions of social and economic disadvantage). Section 8 of the SBA provides a presumption used in making initial social and economic disadvantage determinations. In particular, Section 8 provides that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities," as well as other groups designated from time to time by the Small Business Administration, are presumed to be socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C)(ii). Section 106(c)(2)(B) of the STURAA adopted that presumption for the DOT's DBE program and extends it, in the context of highway and transit contracting, to include women as well. See 101 Stat. 146. After that provision of the STURAA expired in 1991, Congress re-enacted it as Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1919-1921. In 1998, Congress re-enacted the provision as Section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 113-115. See pp. 5-6, *infra*.

Notwithstanding the presumption, the DOT currently requires *all* individuals claiming to be disadvantaged to certify, in a notarized document, that they in fact are socially and economically disadvantaged within the meaning of the statute and agency regulations. 49 C.F.R. 26.67(a)(1); 64 Fed. Reg. 5136. In addition, such individuals must provide financial data to ensure that their net worth does not exceed regulatory limits. 49 C.F.R. 26.67(a)(2), (b); 64 Fed. Reg. 5098, 5117, 5136-5137. Finally, both the presumption and certification may be rebutted, 49 C.F.R. 26.67(b); 64 Fed. Reg. 5136, and third parties may challenge an applicant's eligibility by showing that the applicant is not actually

socially or economically disadvantaged, 49 C.F.R. 26.87; 64 Fed. Reg. 5142.

2. On August 10, 1990, petitioner filed a complaint alleging that the SCC program then in effect violated 42 U.S.C. 2000d *et seq.* (Title VI), and the Fifth and Fourteenth Amendments. Among other things, petitioner contended that it was denied a subcontract on a federal highway project funded by the STURAA because of the SCC program. *Adarand*, 515 U.S. at 205. Petitioner sought only prospective relief.

The district court initially upheld the program under intermediate scrutiny, *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240, 244-245 (D. Colo. 1992), and the court of appeals affirmed, *Adarand Constructors, Inc.* v. *Peña*, 16 F.3d 1537, 1539 (10th Cir. 1994). This Court, however, granted certiorari and vacated the court of appeals' judgment. 515 U.S. at 200, 237. In so doing, the Court rejected the contention that race-based classifications imposed by a federal government agency may be upheld against an equal protection challenge under intermediate scrutiny. Instead, the Court held, such classifications are always subject to strict scrutiny. *Id.* at 227. The Court did not address the constitutionality of the SCC program itself. Instead, it remanded the case to the lower courts to determine "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 238.

Following the remand, petitioner filed a First Amended Complaint, seeking, *inter alia*, a declaration that "§ 105(f) of [the Surface Transportation Assistance Act of 1982], § 106(c) of the STURAA, § 1101(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado." Pet. App. 141. The district court granted petitioner's motion for summary judgment. *Id.* at

200-201. Although the court found that the government had established a compelling governmental interest for the SCC program, the court held that the SCC program did not satisfy strict scrutiny because it was not narrowly tailored to accomplish the asserted interest. *Id.* at 180, 200.

While the case was pending on appeal before the Tenth Circuit, Congress in 1998 reconsidered the DBE program and re-authorized it in the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113. Before passing TEA-21, Congress extensively debated whether to renew the DBE program. During those debates, Congress considered, and soundly rejected by bipartisan votes, two amendments that would have eliminated the DBE program. 144 Cong. Rec. S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). Congress found that goal-based programs like those in the DBE program were the only effective means to combat the continuing effects of discrimination. Studies of DBE participation in several States showed that, where the States terminated their DBE programs, DBE participation in the state-funded portion of the highway program fell to nearly zero. See 144 Cong. Rec. S1404, S1409-1410, S1420 (Mar. 5, 1998); *id.* at S1482 (Mar. 6, 1998). Congress, moreover, found evidence showing that discrimination continued adversely to affect the ability of certain groups to participate in highway construction. For example, there was evidence of overt discrimination in the awarding of subcontracts; pay disparities that cannot be explained by other factors; discrimination in the provision of business loans and bonding; and the adverse consequences of an "old-boy" network that effectively excluded minorities and women. 144 Cong. Rec. S1409, S1413, S1422, S1429-S1430. See 64 Fed. Reg. at 5100-5102 (summarizing).

Congress also considered and debated at length the DBE program as it had been implemented by the DOT under the earlier Acts. During those debates, Congress was made

aware of the fact that the DOT was revising its regulatory program to address outstanding judicial, legislative, and practical concerns, and to more narrowly focus the program's application to small firms owned by individuals who are truly socially and economically disadvantaged. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998). See, *e.g.*, H.R. Rep. No. 550, 105th Cong., 2d Sess. 409-410 (1998) ("The Department of Transportation is reviewing the DBE program in light of recent court rulings and has proposed new regulations to ensure that the program withstands constitutional muster.").

Consistent with Congress's expectation, the DOT developed enhanced regulatory safeguards to ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged—*i.e.*, who have been excluded or handicapped in their participation in the industry by discrimination—participate in the DBE program. For example, the DOT now requires that owners of firms applying for DBE certification, including those who are by statute presumed to be disadvantaged, submit a signed and notarized statement that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1). The statement must also disclose the owner's personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If the individual's personal net worth, as defined by regulation, exceeds $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual is not eligible for the DBE program. 49 C.F.R. 26.67(b)(1). The regulations further provide that any person may challenge whether a specific DBE owner is in fact socially and economically disadvantaged. 49 C.F.R. 26.87. If a recipient of DOT financial assistance has a reasonable basis to believe that an individual owner who is a member of one of the designated groups is not socially and/or economically disadvantaged, it may at any time commence a proceeding to determine

whether the presumption should be regarded as rebutted with respect to that individual. 49 C.F.R. 26.67(b)(2). Individuals who are in fact socially and economically disadvantaged, but who are not subject to the presumption, also may participate in the program. 49 C.F.R. 26.67(d).

Regarding DOT-assisted contracts issued through state and local programs, the DOT's new regulations include several provisions that specifically address narrow tailoring. See 64 Fed. Reg. 5102-5103. For example, recipients of DOT financial assistance may apply to the DOT for waivers that will release them from almost any DOT regulation if they believe that they can achieve equal opportunity for DBEs under local circumstances through other approaches. 49 C.F.R. 26.15. Recipients can also be exempted from any provision of the regulations if special circumstances make compliance impractical. 49 C.F.R. 26.15(a).

The DOT's new regulations also ask recipients to set their own overall annual goals for DBE participation based on local market conditions, 49 C.F.R. 26.45, and expressly state that the statutory ten percent DBE goal is merely a national aspirational goal. Grant recipients thus are not required to set overall annual or contract goals at the ten percent level or to take any special administrative steps if their goals are above or below ten percent. 49 C.F.R. 26.41(c). The particular goal that each recipient selects, moreover, is not imposed by the government; nor may the recipient tie its goal to the ten percent national figure Congress urged the DOT to achieve. Instead, each recipient must select its own method for goal setting based on a two-step process that reflects the recipient's market conditions. 49 C.F.R. 26.45. No penalty is imposed upon a recipient for simply failing to meet its overall goals. 49 C.F.R. 26.47.

The regulations specifically prohibit the use of quotas or set-asides. 49 C.F.R. 26.43; 64 Fed. Reg. at 5107-5108. Indeed, the DOT requires recipients to meet the maximum feasible portion of their goals through race- and gender-

neutral means. 49 C.F.R. 26.51(a). Such means include arranging solicitations in ways that facilitate participation by all small businesses, including DBEs; providing assistance in overcoming limitations such as the inability to obtain bonding or financing; providing technical assistance and services to small businesses; and engaging in outreach efforts. 49 C.F.R. 26.51(b). Contracting agencies are instructed to use potentially race- and gender-conscious measures, such as contract goals, *only* if they cannot meet their overall goals through race- and gender-neutral means. 49 C.F.R. 26.51(d). Even when an in-place contract goal is not met, a prime contractor that demonstrates that it has made good-faith efforts to achieve the goal must be awarded the contract. 49 C.F.R. 26.53. The DOT's new regulations require recipients to reduce their use of DBE-conscious measures during the year if it is determined that they can achieve a greater proportion of their overall goal through race- and gender-neutral measures than previously had been projected. 49 C.F.R. 26.51(f)(1).

3. In January of 1999, the court of appeals held that this case had become moot because Colorado had certified petitioner as a DBE, Pet. App. 117, but this Court reversed, *Adarand Constructors* v. *Peña*, 528 U.S. 216 (2000) (per curiam); Pet. App. 111-112. Following the remand, the DOT in March of 2000 further amended its small business contracting program. This time the DOT eliminated the use of SCCs, the financial incentives the Court had considered in its first *Adarand* decision and that had been the subject of petitioner's complaint. See Pet. App. 97 ("Adarand does not dispute" that "the SCC, which spawned this litigation in 1989, is no longer in use."); Pet. 4.[1]

[1] Indeed, we are advised that there are, at most, one or two outstanding potential (*i.e.*, not yet submitted) claims for payment under contracts with the Central Federal Lands Highway Division, entered into before March of 2000, that contained SCCs. Any such claims for payment, however, would relate to work that has already been completed on contracts that were entered into long ago. Accordingly, such payments (if any) would cause petitioner no injury, and could not form the basis of a claim for prospective relief.

Following the submission of supplemental briefs addressing the new statute and the DOT's new regulations, on September 25, 2000, the court of appeals held that the DOT's current DBE program satisfies constitutional standards. Pet. App. 1-98. Following this Court's guidance in its first *Adarand* decision, 515 U.S. at 227, 238, the court of appeals examined Section 1101(b) of TEA-21 and the new DOT implementing regulations under strict scrutiny, Pet. App. 8, 24, asking whether the program is narrowly tailored to serve a compelling government interest, *id.* at 24, 54-57.

With respect to the government's interest, the court of appeals agreed with the district court that the government had a compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies," Pet. App. 54, and in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," *id.* at 25. The court of appeals reviewed at length the evidence that had been presented to Congress since the early 1970s and found that Congress had "a strong basis in evidence" to support its conclusion "that racial discrimination and its continuing effects have distorted the market for public contracts." *Id.* at 24-49. That evidence had been produced through numerous congressional investigations and hearings, and included outside statistical and anecdotal sources, including the voluminous evidence published in the Federal Register as *The Compelling Interest*, 61 Fed. Reg. 26,050-26,063 (1996). See Pet. App. 36-38. The evidence showed not only that prime contractors refused "to employ minority subcontractors due to 'old boy' networks" and that subcontractors' unions had excluded minorities, but also that minorities were subject to intentional discrimina-

tion in bid selection and in the provision of capital and services needed to compete for and participate on construction projects. Pet. App. 33-39. That evidence, according to the court, supported Congress's finding that racial discrimination has impeded the formation of minority businesses. *Id.* at 33-34. The court of appeals also found that barriers to competition by minority enterprises persisted. *Id.* at 39-44. Among other things, the court of appeals noted congressional investigations that showed racial discrimination by financial institutions and bonding companies; local disparity studies; and evidence that minority participation in state construction markets dropped sharply or disappeared entirely once a State eliminated its DBE program. *Ibid.* Accordingly, the court found that the government had "more than satisfie[d]" its burden of providing a strong basis in evidence supporting the "compelling interest for a race-conscious remedy." *Id.* at 54.

With respect to the requirement of "narrow tailoring," the court of appeals found that certain provisions of the *prior* DBE certification process—*e.g.*, the presumption that members of certain minority groups and women were economically disadvantaged without inquiry into individual circumstances—were not narrowly tailored. Pet. App. 72-74. It also held that the automatic use of financial incentives to encourage the award of subcontracts to DBEs, as originally contemplated by the SCC program, failed to pass constitutional muster. *Id.* at 79. But the court concluded that the new DOT regulations and amendments had cured the constitutional deficiencies in the earlier DBE program. *Ibid.* At the outset, the court of appeals noted that petitioner did not challenge the district court's finding that Congress had unsuccessfully tried to cure the effects of discrimination in the contracting market through race-neutral means. *Id.* at 57-58. Then, citing the requirement that recipients use race-neutral means to meet their overall goals before resorting to race-conscious methods, 49 C.F.R. 26.51(a), and the available

race-neutral measures enumerated in 49 C.F.R. 26.51(b), the court found that the new regulations were narrowly tailored. Pet. App. 59-60.

The court of appeals also determined that the program was narrowly tailored through durational limits. First, the court noted (Pet. App. 62), the presumption of social and economic disadvantage contained in Section 8(d) of the SBA would cease to apply with respect to any individual contractor certified by the Small Business Administration three years after the contractor's initial certification. "If a business wishes to remain certified for longer than three years, it must 'submit a new application and receive a new certification.'" Pet. App. 62. Second, the DOT DBE program itself has a limited duration. It expires at the end of six years, together with TEA-21. *Id.* at 62-63. And Congress's extensive debate regarding whether to renew the DBE program before passing TEA-21, the court further held, underscored the fact that Congress had specifically and recently found that there was still a remedial need for the DBE program. *Ibid.*

The court of appeals also evaluated the DBE program in accordance with four other narrow tailoring considerations discussed in *United States* v. *Paradise*, 480 U.S. 149, 171 (1987): the program's flexibility, the degree to which aspirational goals "correspond to an actual finding as to the number of existing minority-owned businesses," the burden on third parties, and whether the DBE program is over- or under-inclusive. Pet. App. 63-79. As to the first factor, the court found that the flexibility requirement was satisfied because of 49 C.F.R. 26.15's express waiver provision, which allows recipients to seek waivers and exemptions from DBE requirements "despite the already non-mandatory nature of DBE programs." Pet. App. 63-64. Turning to the second factor, the court of appeals emphasized that the five and ten percent national goals were merely aspirational, unlike the mandatory percentage requirement at issue in *City of*

Richmond v. *J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Pet. App. 66. Moreover, the court noted that recipients set their own overall goals according to local market conditions, taking into account "the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts." *Id.* at 67-68. And it observed that there is no penalty if a recipient acts in good faith but fails to meet its goal. *Id.* at 68-69. Those features, the court of appeals stated, ensure that the recipient's goals for DBE participation will realistically (but not inflexibly) reflect the number of available and capable DBEs in the particular market.

The court of appeals further concluded that neither the SCC nor DBE programs imposed a burden on third parties that was of a magnitude that might render the programs constitutionally infirm. Pet. App. 69-71. As for the DBE program, the court found that changes in the SBA and the new DBE regulations under TEA-21 sufficiently cabined the burden on non-minority businesses by making the program narrowly tailored. For instance, the regulations (see 49 C.F.R. 26.61(d); 13 C.F.R. 124.105(c)(1)) now require non-minority applicants for DBE certification to prove social disadvantage by a preponderance of the evidence, rather than by clear and convincing evidence. Pet. App. 70. The new regulations, furthermore, "require recipients to ensure that DBEs are not 'so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate.'" Pet. App. 70 (citing 49 C.F.R. 26.33(a)).

Lastly, the court of appeals rejected petitioner's argument that Congress must inquire into discrimination against each particular minority group or women in a State's construction industry in order to ensure that the DBE program is not over- or under-inclusive. Pet. App. 71-79. Citing the new regulations' requirement that DBE applicants submit notarized statements of their owners' social and economic disadvantage along with documentation in support of the

economic disadvantage claim, 49 C.F.R. 26.67(a), the court found that such an individualized showing was enough to satisfy narrow tailoring. Pet. App. 74-75. The court further held that to mandate an individualized inquiry into the DBEs in discrete markets like the Colorado construction industry would be "at odds with [Tenth Circuit] holdings regarding compelling interest and Congress's power to enact nationwide legislation." *Id.* at 75-77 & n.25. Indeed, the court of appeals observed, to require the "degree of precise fit" that petitioner proposed "would again render strict scrutiny 'fatal in fact.'" *Id.* at 77. Such automatic "fatality is inconsistent with [*Adarand*] * * * in its declaration that strict scrutiny was not fatal in fact." *Ibid.*

ARGUMENT

The court of appeals in this case correctly and carefully applied the test of strict scrutiny to evaluate the constitutionality of the Department of Transportation's (DOT) Disadvantaged Business Enterprises (DBE) program. Its decision does not conflict with any decision of this Court or any other court of appeals. The decision, in fact, is the first court of appeals decision to address the validity of that program following this Court's decision in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and the substantial revisions that the DOT made to the program in response to *Adarand*. This case, moreover, focused primarily on a specific aspect of the DOT's small business program—the use of Subcontractor Compensation Clauses or SCCs—that had been discontinued before the court of appeals issued its decision, and petitioner sought only prospective relief. Consequently, the case has become somewhat divorced from the concrete context of an actual application that traditionally assists this Court in deciding cases. Moreover, other federal courts are now reviewing the current DOT DBE program. Those cases will permit a number of circuits to address the constitutionality of the program in a context with a more meaningful

forward-looking effect, and consequently provide this Court with the opportunity to conduct further review as appropriate. Accordingly, review of the issue raised by petitioner is not, at this time, warranted.

1. Although "[s]trict scrutiny remains * * * strict," *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion), this Court has rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand*, 515 U.S. at 237. Petitioner does not dispute that the decision below, by its terms, applies strict constitutional scrutiny to the DOT's DBE program. Instead, petitioner argues that the court of appeals' application of strict scrutiny may have been somewhat more "lenient" than it should have been. Pet. 5. Petitioner, however, identifies nothing in the court of appeals' opinion that states, much less holds, that there are two standards of strict scrutiny, or that a lesser standard of strict scrutiny should be or was applied here. Instead, petitioner points to a series of alleged (and mostly case-specific) errors that, in petitioner's view, amount to a *misapplication* of the strict scrutiny test. See Pet. 16 ("Although the panel correctly recited that test, * * * the panel badly misapplied each of the elements."). For example, petitioner argues that the court of appeals overlooked race-neutral remedies, Pet. 10-13; misanalyzed the durational limits on the DBE program, Pet. 13-14; and accepted as "strong evidence" proof that, in petitioner's view, was not strong at all, Pet. 15-25. The allegation that a court of appeals has misapplied settled law to the particular facts of a case is not the sort of matter that ordinarily warrants this Court's review.

Indeed, for that reason, the question on which petitioner seeks review is not well presented by this case. If the court of appeals had concluded that Congress's findings are entitled to greater deference (within the confines of strict scrutiny) than similar findings by a state or local government, there would be some justification for that conclusion. The judiciary is bound to give the decisions of Congress—the co-

equal branch of government to which Section 5 of the Fourteenth Amendment textually accords specific remedial authority—"great weight." See *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when * * * Congress specifically considered the question of the Act's constitutionality."). As Justice O'Connor's opinion in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), explains, "other governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.'" 488 U.S. at 489 (quoting *Fullilove*, 448 U.S. at 515-516 n.14 (Powell, J., concurring)). See also *id.* at 521-523 (Scalia, J., concurring). Although *Adarand* makes it clear that the use of any race-conscious measure (whether by the federal government or a State) is subject to strict scrutiny, the opinion reserves judgment on "the extent to which courts should defer to Congress' exercise of [its] authority" within the confines of strict scrutiny. 515 U.S. at 230-231. See also *id.* at 268-269 (Souter, J., dissenting). Because the decision below declines to resolve that issue, Pet. App. 25-26, instead finding that the DBE program as currently constituted survives an undifferentiated standard of strict scrutiny, this case does not present the Court with reason to resolve the issue either.

In any event, following this Court's decision in *Adarand*, Congress comprehensively re-examined and then reauthorized the DBE program in the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113, and did so on the understanding that the DOT was in the process of revising its implementation to address outstanding judicial, legislative, and practical concerns, and to more narrowly focus the program's

application to small firms owned by individuals who are truly socially and economically disadvantaged. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998); H.R. Rep. No. 550, 105th Cong., 2d Sess. 410 (1998) (TEA-21 Conference Report). As a result of those recent revisions, the current DBE program and regulations significantly differ from those in place when this Court decided *Adarand*, and the decision below represents the first and to date only appellate decision addressing their constitutionality in light of *Adarand*. Given the significant nature of the revisions the DOT made to its regulations following *Adarand*, we believe it would be appropriate to permit other courts to address the constitutionality of the program, as currently constituted, in light of *Adarand* before this Court undertakes such review for itself.

That course would be particularly appropriate here because this lawsuit, although not moot, in large part seeks prospective relief with respect to a device, the SCC, that is no longer used. In contrast, there are a number of pending lawsuits against the DOT concerning the federal DBE program, and against state and local public authorities, challenging other features of the current program.[2] Other lower courts are also considering the constitutionality of race-based classifications in other federal government contracting

[2] See *Klaver Constr. Co.* v. *Kansas Dep't of Trans.*, No. 99- 2510-KHV (D. Kan.); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, No. 00-CV-1026 (D. Minn.); *Gross Seed Co.* v. *Nebraska Dep't of Roads*, No. 00-3073 (D. Neb.); *Western States Paving Co.* v. *Washington Dep't of Transp.*, No. 00-5204 (W.D. Wash.); *Northern Contracting, Inc.* v. *Illinois*, No. 00-4515 (N.D. Ill.); *Falconite, Inc.* v. *Oklahoma*, No. 00-CV-1494 (W.D. Okla.); *Houston Contractors Ass'n* v. *Metropolitan Transit Auth.*, No. H-98-3651 (S.D. Tex.); *Kossman Contracting Co.* v. *Metropolitan Transit Auth.*, No. H-96-3036 (S.D. Tex.).

programs.[3] Those pending cases will permit a number of circuits, in the near future, to address the issue in a more meaningful and concrete context. Once that has occurred, this Court can determine whether further review of the issue is appropriate and, if it conducts that review, it will have the benefit of the considered judgment of multiple lower federal courts. As Justice Stevens stated respecting the denial of petitions for a writ of certiorari in *McCray* v. *New York*, 461 U.S. 961, 963 (1983), "it is a sound exercise of discretion for the Court to allow [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."

Another factor counseling against review at this time is the fact that the program is subject to review by the Comptroller General this year. TEA-21 itself provides that "the Comptroller General of the United States shall conduct [in 2001] a review of, and publish and report to Congress findings and conclusions on, the impact throughout the United States of administering the" DBE provisions. TEA-21 § 1101(b)(6), 112 Stat. 114. The Court ought not undertake the important task of constitutional review of the program before that legislatively mandated review takes place.

2. Petitioner's remaining contentions are unsupported by the law or the record, and in any event are largely case-specific. As a result, none warrants this Court's review.

a. Petitioner spends much of its brief attacking the finding that the government has a compelling interest to support the DOT's DBE program. The court of appeals, petitioner asserts, erred in finding that interest supported by "society-wide disparities" rather than "particularized findings of racial discrimination" suffered by individual qualified minority companies, Pet. 16, 19-21, and by finding that the DBE pro-

[3] See, *e.g.*, *C.S. McCrosson* v. *Cook*, No. 95-1345 (D.N.M.), appeal pending, No. 00-2515 (10th Cir.); *DynaLantic* v. *Department of Defense*, No. 95-CV-2301 (D.D.C.).

gram was narrowly tailored even though there allegedly was no showing that Congress inquired into whether each person seeking to take advantage of a race-based preference had suffered from the effects of discrimination at the hands of the government, Pet. 7-10. The court of appeals' failure to require such particularized findings, petitioner contends, is inconsistent with the requirements of strict scrutiny set forth by this Court's decision in *Croson*, *supra*, and its first *Adarand* decision. Pet. 7-15.

As an initial matter, those claims appear to rest on the erroneous factual assumption that individual applicants may obtain the DBE designation without any individualized showing that they have suffered discrimination. The DOT's new regulations refute that assumption. Under those regulations, the owners of firms seeking DBE designation must certify that they are in fact socially and economically disadvantaged. 49 C.F.R. 26.67(a). Owners thus, in effect, must certify in a notarized document that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities" so as to establish social disadvantage, 15 U.S.C. 637(a)(5), *and* that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," so as to establish economic disadvantage, 15 U.S.C. 637(a)(6)(A). The DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants for DBE certification, moreover, must submit documentation of their owner's personal wealth; if the owner's net worth exceeds $750,000, any presumption of disadvantage is considered irrefutably rebutted. See 49 C.F.R. 26.67(a)(2). Even a facially valid certification, moreover, is

rebuttable, 49 C.F.R. 26.26(b); and third parties may challenge eligibility by showing that the owner is not actually socially or economically disadvantaged, 49 C.F.R. 26.87.

As a result, the DOT's current DBE program *does* look to whether those seeking to participate have individually suffered the effects of the discrimination that the program seeks to redress. And the DOT's preliminary experience with the requirement suggests that it has a significant effect; imposition of the certification requirement, it appears, substantially alters both the number and identity of DBE applicants. The certification requirement for social and economic disadvantage, moreover, guards against over-inclusiveness, ferreting out those who are not truly disadvantaged. And it renders petitioner's claim that it has been harmed by the use of racial categories or presumptions largely illusory. As the district court explained in *Interstate Traffic Control* v. *Beverage*, 101 F. Supp. 2d 445, 453 (S.D. W. Va. 2000), the only way another party may now be injured by the rebuttable race- or gender-related presumption set forth in the statute is if an applicant commits fraud by falsely certifying and the fraud goes unchallenged. Petitioner nowhere alleges that such fraud exists, much less that it is sufficiently common as to have a likely effect on petitioner in the future.[4]

Petitioner also argues that Congress cannot exercise its national jurisdiction to establish a national program; instead, petitioner seems to argue, Congress can have a compelling interest only if it makes localized, market-by-market

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[4] Perhaps recognizing that the new regulations are largely fatal to its position, petitioner argues that the new regulations are not applicable to the current challenge, and are in any event inconsistent with the statute and therefore invalid. See Pet. 26-29. As explained below (pp. 26-29, *infra*), it is far from clear that those arguments are properly before the Court, and they are without merit. In any event, Congress has the authority to make group specific determinations of discrimination, and we disagree with petitioner's submission that Congress may act to correct the effects of discrimination only after making specific findings for each victim participating in a remedial program. See pp. 14-15, *supra*.

findings of discrimination and disadvantage for each covered local jurisdiction throughout the country. The court of appeals properly rejected that contention. Pet. App. 27. In *Croson*, this Court rejected the City of Richmond's attempt to justify a "rigid [30%] racial quota" in the awarding of City contracts, where the City presented no evidence of discrimination in the Richmond construction industry. 488 U.S. at 499-500, 504. *Croson*, however, does not speak to the geographic scope of Congress's powers; it speaks to the fact that local authorities must justify their use of race-conscious remedies based on local conditions. Moreover, *Croson* specifically contrasts the powers of Congress with those of the States. *Id.* at 504; *id.* at 490 (opinion of O'Connor, J.) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that * * * the States and their political subdivisions are free to decide that such remedies are appropriate.").[5] In any event, even though the DBE program is national in nature, the portion of it that is subject to strict scrutiny—the use of race-conscious means—is not of uniform nationwide application. To the contrary, that portion of the program is distinctly and heavily tailored to local conditions. Pet. App. 27 n.10 (noting that issue is best addressed under narrow tailoring). The new DOT regulations provide a system of waivers and exceptions based on local concerns, and bar the use of any race-conscious remedy where the effects of discrimination and program goals can be achieved through neutral means. See pp. 11-12, *supra*; p. 25, *infra*.

Finally, petitioner seems to contend that the federal government has no interest in eliminating the effects of discrimi-

[5] Nothing in the Court's subsequent decision in *Adarand*, 515 U.S. at 200, eliminates that fundamental distinction between the remedial authority of Congress and that of state and local governments. That decision merely clarified the standard of review that courts should apply to federal racial classifications; it did not limit the geographic scope of Congress's authority.

nation unless the federal government *itself* has engaged in illegal discrimination. See Pet. 21. That assertion is incorrect as a matter of law. Pet. App. 26. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.).[6] Congress acted within its authority in creating the DBE program to achieve that end here.

b. Petitioner also argues that in this case the government did not produce sufficiently convincing proof of discrimination in the highway construction industry. In particular, petitioner asserts (Pet. 11-14) that the court of appeals erroneously treated common barriers, faced by all new entrants to the industry, as barriers to minority participation that might justify a race-conscious remedy. That argument, however, mischaracterizes the evidence on which the court of appeals and Congress relied. The evidence showed that certain groups suffered discrimination—both overt and covert—in access to capital and needed services, such as the provision of performance and payment bonds, not because they were new entrants but because of race and gender. For example, the court found that the "government's evidence is particularly striking in the area of race-based denial of access to capital." Pet. App. 35. The court noted studies showing disparate treatment of black-owned businesses even when "all other factors are equal"—including one study showing that certain minorities were 1.5 times to 3 times as likely to be turned down for "loans as whites"—and concluded that the "findings strongly support an initial showing of discrimination in lending." Pet. App. 37-38. Petitioner also

[6] A substantial portion of federal transportation dollars is distributed to subcontractors, which are not selected by the government on the basis of lowest bids, but are chosen instead at the discretion of private prime contractors. See p. 22, *infra*.

ignores the evidence, specifically cited by the court of appeals, that prime contractors "often resist working with" minority enterprises by "shopping" low bids from minority-owned firms to avoid contracting with them, *id.* at 41, and others showing that minority-owned firms are two to three times as likely to be denied performance and payment bonds (a necessity in government contracting) as white-owned firms "with the same experience level," *id.* at 42-43. See also *id.* at 44 (evidence of discriminatory pricing by suppliers). Moreover, to the extent petitioner believes that a particular DBE applicant has not suffered disability beyond that suffered by any other new entrant into the industry, petitioner is free to challenge the applicant's DBE status; petitioner, however, has chosen not to do so.[7] Finally, petitioner's argument is belied by numerous studies, considered by Congress before it passed TEA-21, showing that minority participation in various States became virtually nonexistent once the state DBE program was eliminated, and demonstrating that minorities face barriers not shared by all new businesses. Pet. App. 49; see also 144 Cong. Rec. S1401, S1409-1410, S1420 (Mar. 5, 1998); *id.* at S1482 (Mar. 6, 1998). Congress thus did not, as petitioner contends (Pet. 11-12), reject race-neutral alternatives in favor of the DBE program without considering such alternatives. Instead, it found that those alternatives had proved ineffectual.[8]

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[7] Petitioner's claim that the court of appeals improperly shifted the burden of proof (Pet. 24-25) is without merit. The court of appeals expressly put the government to its "burden of presenting a 'strong basis in evidence' sufficient to support its articulated * * * compelling interest." Pet. App. 49. It simply found that the government had done so, and noted that petitioner had "utterly failed" to introduce evidence of its own to rebut the government's proof. *Id.* at 50-54.

[8] Perhaps recognizing its failure to rebut the evidence relied on by Congress and the court of appeals, petitioner also argues that such evidence is irrelevant because it was not before Congress in 1978 when the presumption of disadvantage in the SBA was first enacted. See Pet. 21-22. But when Congress reconsidered and then re-authorized the DOT's DBE program in 1998—specifically rejecting amendments that would have eliminated the program—Congress did have that extensive evidence before it. See pp. 5-6, 15-16, *supra*. See also TEA-21 Conference Report, *supra*, at 409 ("Subsection 102(b) continues the Disadvantaged Business Enterprise provisions."). Consequently, for present purposes, the relevant record is the one Congress addressed when it reconsidered the program in 1998 in light of this Court's *Adarand* decision; not the record that existed pre-*Adarand* in 1978. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (courts must review significant changes to the law or facts when considering injunctive relief).

Alternatively, petitioner attempts to attribute ill intentions to Congress, declaring (Pet. 23-24) that "it is clear from the legislative history of the most recent highway funding statute to incorporate the racial classifications" that Congress was not providing a remedy for individualized harm, but rather was trying to achieve "racial proportionality in the highway construction industry." See also Pet. 19-21. But the legislative history shows precisely the opposite to be true. Congress sought to remedy the effects of discrimination; it was aware of and relied on the proposed DOT regulations when it considered passing TEA-21; and it wanted to ensure that the DBE program was constitutional, and not over-inclusive, before renewing the DBE program. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998). See also TEA-21 Conference Report, *supra*, at 409-410. The new regulations, for example, contain such safeguards as requiring recipients of DOT financial aid to devise overall goals for DBE participation that reflect local conditions. 49 C.F.R. 26.45(c). And those seeking DBE designation, moreover, must certify that their owners are socially and economically disadvantaged. 49 C.F.R. 26.67(a).

3. Petitioner also claims that the DOT's DBE program is not narrowly tailored. Pet. 8-14. Petitioner's contentions on narrow tailoring, however, largely mirror its arguments regarding the compelling interest. For example, petitioner argues (Pet. 8) that the program is not narrowly tailored be-

cause no individual proof of economic and social disadvantage is required of DBE program participants. As explained above (pp. 18-19, *supra*), that is incorrect—*all* participants must certify, in a notarized document, that they are in fact socially and economically disadvantaged, *i.e.*, that they have been subject to discrimination and have been deprived of the opportunity to participate in the relevant market as a result; and third parties like petitioner may challenge that certification and put any applicant to its burden of proof. Nor is it true (Pet. 10-11) that the barriers to participation the DBE program seeks to overcome are common to all new entrants. The record demonstrates that women and minorities face a unique barrier in this context—discrimination. See pp. 21-22, *supra*. See also 61 Fed. Reg. 26,050-26,063 (1996). That is the barrier the DBE program seeks to overcome.

Petitioner, moreover, mostly ignores the numerous ways in which the program is finely tailored. See *United States* v. *Paradise*, 480 U.S. 149, 187 (1987) (articulating additional factors relevant to narrow tailoring). Most important, the DOT's certification and qualification rules ensure that benefits flow only to those who are truly disadvantaged. All owners of firms applying for certification as a DBE, including minorities and women presumed to be disadvantaged, must submit a signed, notarized statement certifying not only that they are socially and economically disadvantaged, but also verifying their personal net worth, with appropriate supporting documentation. 49 C.F.R. 26.67. If the individual owner's personal net worth exceeds $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual and firm are not eligible to participate in the DBE program. 49 C.F.R. 26.67. Moreover, when a firm's receipts exceed small business standards, it can no longer participate in the program, regardless of its owner's personal net worth. 49 C.F.R. 26.65. Any DBE certification may be challenged, and the DBE program is open to all: Non-

minorities may apply for DBE certification, 49 C.F.R. 26.65, and need demonstrate social and economic disadvantage only by a preponderance of the evidence (not by clear and convincing proof, as formerly required). See 49 C.F.R. 26.67.

Moreover, under the new regulations, recipients may request a waiver from the DBE program (as Colorado has) if they choose to operate their program differently from the way recommended in DOT regulations, see Preamble to 49 C.F.R. 26.15, or receive exemptions if, because of unique circumstances not considered by the DOT, compliance with specific provisions is impractical, 49 C.F.R. 26.15. Recipients subject to the DOT's regulations, moreover, must meet the maximum feasible portion of their annual DBE goals through race-neutral methods, 49 C.F.R. 26.51(a), and may use race-conscious methods only if necessary, 49 C.F.R. 26.51(d). The DBE goals for each recipient, moreover, are established by the recipient itself, under flexible criteria adjusted for local market conditions. 49 C.F.R. 26.45. Recipients are neither required nor encouraged to emulate the nationwide aspirational ten percent goal or employ special measures if their goals are below that level. 49 C.F.R. 26.41(c). And, in setting their goals, recipients must create a baseline figure for the relative availability of ready, willing and able DBEs in each recipient's local market, 49 C.F.R. 26.45(c), and adjust the base figure to ensure that the overall annual goal truly reflects the level of DBE participation that recipients would expect absent the effects of discrimination, 49 C.F.R. 26.45(d). The procedure thus does not bestow any undue benefits on DBEs, but rather seeks to place them on as nearly level a playing field as reasonably possible.[9]

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[9] Recipients also must ensure that non-DBEs are not unfairly excluded from competing for subcontracts through an over-concentration of DBEs in one particular line of business. 49 C.F.R. 26.33. In addition, basing an annual goal and contract goals on the availability of DBEs ensures that, to the extent it is necessary to employ race-conscious criteria,

Finally, the DBE program, having been authorized under a funding statute, is subject to continuous study and periodic re-authorization, adjustment, and review. See pp. 11, 17, *supra*. The program thus will not, and cannot, operate in perpetuity.[10]

Seeking to avoid the effect of those important requirements, many of which were imposed by the 1999 regulations, petitioner asserts (at 25-29) that the court of appeals should not have relied on them. Petitioner does not dispute that, because it seeks solely prospective relief, only the current law and regulations are relevant to its challenge. See *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam) (where plaintiff seeks prospective relief, Court "must review the judgment * * * in light of [the] law as it now stands"); cf. *Rufo*, 502 U.S. at 384. Instead, petitioner argues (Pet. 26-27) that the new regulations do not apply here because they are directed at state and local contracts, rather than federal procurement contracts like the federal contract containing the Subcontractor Compensation Clause (SCC) that petitioner originally challenged.

Petitioner, however, did not raise that argument below, and the court of appeals did not address it. This Court ordinarily does not pass on arguments that were neither pressed

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those are not employed to reduce participation by non-DBE's below current availability to perform government contracts.

[10] Petitioner argues (Pet. 13-14) that, because the program is predicated on barriers to entry that are common to all new entrants, it will operate indefinitely. That argument, however, rests on the mistaken premise that the program is predicated on barriers to entry, not actual discrimination that has prevented and continues to prevent participation by certain groups. In any event, given the sensitive nature of the program and the ongoing nature of review, it is highly doubtful (and certainly premature to predict) that the program's duration is indefinite. Indeed, petitioner ignores the fact that the DBE program was extensively debated before Congress passed TEA-21, expires in 2004, and, as provided in the statute, will be reviewed by the Comptroller General of the United States in 2001. 112 Stat. 114.

nor passed upon in the court of appeals. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1989); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).[11] And the argument is without merit. If this case could be characterized only as a challenge to the use of SCCs in federal procurement contracts, it would be moot, because SCCs have been abolished. Moreover, even in the context of that now-defunct program, the criteria for DBE certification were found in the DBE *regulations*, as petitioner has conceded before. Pet. App. 159. Additionally, when the DOT was implementing the SCC program, it ordinarily contracted with prime contractors, who in turn subcontracted with DBEs. *Adarand*, 515 U.S. at 205. As a result, the DOT did not (and does not) *itself* certify the DBEs, including the DBE, Gonzales Construction Company, that was awarded a subcontract over petitioner a decade ago. Instead, *state entities* receiving federal funding, such as the Colorado Department of Transportation, certified the DBEs *in accordance with DOT DBE regulations*. *Adarand*, 515 U.S. at 209. As a result, the extensive federal aid program regulations, which define the gamut of requirements relating to DBE certification ranging from obligations of the applicant for DBE certification to duties of the recipient state authority, provide the relevant legal framework for constitutional review.[12] Even if that were fairly debatable,

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[11] In fact, in the district court, petitioner had argued (and the district court accepted) that its lawsuit necessarily implicated the regulations because the regulations define the requirements for DBE certification in the federal aid DBE program. Pet. App. 159. Petitioner similarly relied on the pre-1999 version of the regulations in its last petition for a writ of certiorari, and claimed that Colorado's DBE program was inconsistent with the regulations. Pet. at 18-25 & n.24, *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000) (No. 99-295).

[12] Nor can petitioner avoid the effect of those regulations by arguing that it is bringing a facial challenge to the statutes themselves. If the statutes can be implemented in a constitutional manner through the regu-

however, any doubt concerning which law or regulation (or which version of the law or regulation) should be scrutinized in this case weighs strongly in favor of denying review, so the Court may take up the constitutional issue in a case that more clearly and cleanly presents it.

Petitioner also argues (Pet. 28-29) that the 1999 regulations are void because they eliminate or alter Section 8(d)'s "mandatory" presumption of disadvantage by requiring applicants for DBE certification to aver that they meet the relevant criteria and submit documentation regarding economic disadvantage. It is questionable, as an initial matter, whether petitioner has standing to challenge the validity of those requirements, since they cause petitioner no cognizable injury. The court of appeals, moreover, did not address that argument, and there is no reason for this Court to consider it in the first instance. Besides, the argument is without merit. Under the regulations, the presumption continues to operate, since actual proof of disadvantage would be required in its absence. Moreover, Congress clearly intended the presumption to be rebuttable, see S. Rep. No. 4, 100th Cong., 1st Sess. 28 (1987), and the DOT has always treated it as such. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and TEA-21, in any event, expressly give the Secretary of Transportation regulatory discretion in implementation. For instance, the aspirational goal for DBE participation in TEA-21 is qualified by the phrase "[e]xcept to the extent that the Secretary determines otherwise." Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 113.

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lations, the facial challenge must fail. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (court cannot strike down a statute as facially invalid unless there is "no set of circumstances * * * under which the Act would be valid"). In addition, it is not clear that a challenge to the statute alone would constitute a genuine case or controversy. Petitioner cannot claim injury from the statute alone, since the statute is not self-executing. Any injury petitioner may claim must arise from the application of the statute by the DOT through its regulations.

See also ISTEA, Pub. L. No. 102-240, Tit. I, § 1003(b), 105 Stat. 1919-1920 (same).[13]

Finally, petitioner contends (Pet. 27-28) that the statutory presumption for *social* disadvantage is over-inclusive, and the new regulations alter only the presumption for economic disadvantage. But the regulations require all applicants for DBE certification to provide not only a notarized statement of their net worth, but also a notarized statement that they are both socially and economically disadvantaged. 49 C.F.R. 26.67.[14] That certification requirement for showing both

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[13] Nothing in this Court's decision in *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000), is to the contrary. In that decision, the Court simply concluded that Colorado's DBE certification procedure, which did not provide a presumption of social disadvantage for women and certain minorities, was incompatible with the 1999 DBE regulations, which do allow for such a presumption. *Id.* at 222-223. That decision, therefore, has no bearing on whether the presumption of social and economic disadvantage in Section 8(d) may be implemented by the 1999 regulations. Cf. No. 00-295 Pet. at 29. Colorado has changed its DBE program to include the presumption of social and economic disadvantage in conformity with the DOT's DBE regulations.

[14] In addition, petitioner's argument is rebutted by the fact that Section 8(d)'s presumption of disadvantage is a single presumption that applies when the criteria for both social *and* economic disadvantage are met. See 15 U.S.C. 637(d)(1) (1994 & Supp. IV 1998); 49 C.F.R. 26.67. Because the presumption may be invoked only if the applicant for DBE certification is both socially and economically disadvantaged, the refined criteria for determining economic advantage—the requirement that applicants for DBE certification submit documentation of their personal wealth and the rebuttal of the presumption of disadvantage if the applicant's net worth exceeds $750,000, 49 C.F.R. 26.67(b)(1)—render the entire statutory economic and social disadvantage presumption more narrowly tailored. Thus, if a DBE applicant does not meet the economic disadvantage requirements, that applicant is not entitled to a presumption of disadvantage even if he or she may be deemed socially disadvantaged. Under these circumstances, petitioner's demand for more exacting criteria (Pet. 14-15) for showing social disadvantage would be redundant. The certification requirements imposed in the new regulations establish that application of the presumption of social and economic advantage is, contrary to petitioner's assertion, far from "mandatory" and "conclusive." Cf. Pet. 9-10.

social and economic disadvantage guards against over-inclusiveness. Indeed, as explained above (p. 19, *supra*), the requirement ensures that, absent undetected fraud, only those who are truly economically and socially disadvantaged participate in the program, notwithstanding the statute's presumptions. And no allegation of such fraud has been made here.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] The extensive record of discrimination, and the above-described features of the DOT's DBE program, distinguish that program from those addressed in the cases cited by petitioner (at 7) as conflicting with the decision below. For example, in *Monterey Mechanical Co.* v. *Wilson*, 125 F.3d 702 (9th Cir. 1997), the court of appeals did not resolve "how much proof, or what kind of legislative findings" would be required because "the state made absolutely no attempt to justify" the ethnic and gender categories it employed; nowhere did it show that tax money was, in effect, subsidizing discrimination. 125 F.3d at 713. Moreover, the program there, unlike the one here, was not narrowly tailored through a certification requirement or any other means. 125 F.3d at 714. *Contractors Associations of Eastern Pennsylvania* v. *City of Philadelphia*, 91 F.3d 586, 607 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997), is similarly distinguishable. There, the City Council did not show that the 15 percent set-aside for African-American contractors was designed to "approximate market share for black contractors that would have existed, had the purported discrimination not existed," and the percentage selected was disproportionate to the number of minority "construction firms qualified to perform City-financed contracts." 91 F.3d at 607. The participation goals set by recipients here, in contrast, are flexible, based on the availability of qualified DBE firms, and calculated to offset the effects of discrimination. See p. 25, *supra*. Finally, in *Associated General Contractors* v. *Drabick*, 214 F.3d 730 (6th Cir. 2000), petition for cert. pending, No. 00-976, the State's evidence of discrimination was less compelling, *id.* at 736; there was no consideration of non-racial criteria, *id.* at 738; and there was no effort at narrow tailoring through a certification mechanism or otherwise, *id.* at 737.

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No. 00-730

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

RODNEY SLATER, Secretary of the United States Department of Transportation, KENNETH WYKLE, Administrator of the Federal Highway Administration, VINCENT F. SCHIMMOLLER, Administrator of Region VIII, Federal Highway Administration, and LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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2 pp

TABLE OF CONTENTS

Page

I. Certiorari Should Be Granted Because The Panel's Decision Is Not A Mere Misapplication Of Law; It Is A Gross Distortion Of Strict Scrutiny That Directly Conflicts With The Instructions Of This Court And Decisions By Other Circuits 1

II. Certiorari Should Be Granted Because There Is No Barrier To Adarand's Challenge Of The Validity Or Applicability Of The New TEA-21, Regulations 6

III. Disuse Of The SCC Is Irrelevant To Whether Certiorari Should Be Granted Because Adarand Also Challenges The Statutory Scheme That Gave Rise To The SCC 10

CONCLUSION 10

APPENDIX

Letter of Rodney Slater, Secretary, United States Dept. of Transp. to Thomas Norton, Exec. Dir., Colo. Dept. of Transp. dated March 28, 2000 ..App. 1

Complaint .....App. 4

First Amended Complaint .....App. 7

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Adarand Constructors, Inc. v. Pena, 500 U.S. 200 (1995) 1, 2, 5, 9

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) 1, 5, 8

Bazemore v. Friday, 478 U.S. 385 (1986) 3

Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) 5

Fullilove v. Klutznick, 448 U.S. 448 (1980) 2

Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582 (1983) 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7

Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936) 7

Matsushita Elect. Indus. Co. v. Epstein, 516 U.S. 367 (1979) 9

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 7

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 1, 3

United States Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 5

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 1

CIRCUIT COURT CASES

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 2000 WL 1375571 (10th Cir. 2000) 3, 4

TABLE OF AUTHORITIES – Continued

Page

Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997) 2

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 2

Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333 (7th Cir. 1989) 4

Smith v. Virginia Commonwealth University, 84 F.3d 672 (4th Cir. 1996) 3

Webster v. Fulton County, 51 F.Supp. 2d 1354 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000) 4

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 3

DISTRICT COURT CASE

Adarand Constructors, Inc. v. Pena, 965 F.Supp. 1556 (D. Colo. 1997) 10

STATUTES AND REGULATIONS

Transportation Equity Act for the Twenty First Century ("TEA-21"), Pub. L. No. 105-178, § 1101(b) (1998) 6, 10

Small Business Assistance Act, Section 8(d), Pub. L. No. 95-507 (1978), 15 U.S.C. § 637(d) 6, 10

49 C.F.R. Part 26 (2000) 7, 9

TREATISES

1 Weinstein's Federal Evidence § 301.02[1] (2nd Ed. 2000) 6

TABLE OF AUTHORITIES – Continued

Page

2 McCormick on Evidence § 346 (5th Ed. 1999) 6, 7

9 Wigmore on Evidence § 2493f (5th Ed. 1999) 6

LEGISLATIVE HISTORY

144 Cong. Rec. H-2000 1

OTHER AUTHORITIES

Letter of Rodney Slater, Secretary, United States Dept. of Transp. to Thomas Norton, Exec. Dir., Colo. Dept. of Transp. dated March 28, 2000 8

Complaint 10

First Amended Complaint 10

REPLY

I. Certiorari Should Be Granted Because The Panel's Decision Is Not A Mere Misapplication Of Law; It Is A Gross Distortion Of Strict Scrutiny That Directly Conflicts With The Instructions Of This Court And Decisions By Other Circuits.

Respondents make much of the panel's correct statement of the elements of strict scrutiny, as though mere recitation of criteria were a talisman. Resp. at 14. The empty explication of the elements of a test, however, does not weigh against *certiorari*, as is evident from this Court's most recent decision in this very case. Pet. App. at 111. Instead, because the panel's decision is a wholesale perversion of strict scrutiny, correction by this Court is all but mandated.

Strict scrutiny requires strong evidence of past discrimination to support a compelling interest in remediating the effects of that discrimination. Pet. App. at 224 (majority opinion); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (majority opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). Thus, when the asserted compelling interest is remediation of past prejudice, as it is in this case, "the true test of an affirmative action program is . . . the adequacy of the evidence of discrimination offered to show that interest."[1]

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[1] The asserted interest, however, must be a permissible one. Despite Respondents' contrary assertion, Resp. at 23, Congress' impassioned but impermissible goal here was racial proportionality, as is evident in the following exemplary statements. The DBE program is "a necessary means in trying to achieve true multi-cultural and multi-gender diversity amongst those people this government chooses to do business with." 144 Cong. Rec. H-2006 (daily ed. April 1, 1998) (statement by Rep. Jackson-Lee). "We all contribute to that [general commerce] pot every year. So when it comes time to cut it up, we should all get a piece. . . . [w]omen and minorities [in]cluded." *Ibid.* at H-2007 (statement by Rep. Brown).

Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 906 (11th Cir. 1997). To apply the test, therefore, a reviewing court must make an independent assessment of the proffered evidence. *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564-65 (11th Cir. 1994) (and cases marshaled there).

Abandoning this established law, the panel effectively substituted an entirely new test.[2] That is, instead of independently assessing the evidence in any meaningful way, the panel accepted a series of conclusory statements as truth and then blessed the challenged statutes. If allowed to go uncorrected, the panel's severe distortion of strict scrutiny ultimately would destroy that crucial standard.[3] Further, the panel's refusal to apply established law puts the panel in direct conflict with this Court and other circuits.

One obvious example of the panel's mutation of the test is its failure to consider whether the statistical analyses it quoted for their results contained regression analyses

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[2] Insofar as it resembles the more lenient standard of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the panel's mutated test is not new; it is old and overruled. In this very case, this Court expressly held that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." Pet. App. at 241. For the same reason, Respondents' assertion that the panel was correct to apply a more lenient test to Congress, Resp. at 14-15, cannot be entertained.

[3] If there is to be any change in the strict scrutiny test, then the change should be the one Justice Scalia has urged on more than one occasion, not the one a majority of this Court so recently overruled. *See infra*, n.2. Under Justice Scalia's test, evidence of discrimination against some "creditor" race in the past could never justify deliberate, legally mandated discrimination against some other "debtor" race in the present. Pet. App. at 245 (Scalia, J., concurring). Applying this test, "[i]t is unlikely, if not impossible, that the challenged program would survive. . . . " *Id.*

that accounted for the right variables. Pet. App. at 35-38. Such probing is irrefutably mandatory because "the requirement of considering various salient causal factors is part and parcel of [the government's] duty to limn a plausible causal relationship between particular independent and dependent variables." *Wessmann v. Gittens*, 160 F.3d 790, 834 n.8 (1st Cir. 1998) (internal citations omitted). In fact, "the Supreme Court unanimously held . . . that a regression analysis that does not control for at least major variables may be altogether inadmissible." *Smith v. Virginia Commonwealth University*, 84 F.3d 672, 681 (4th Cir. 1996), *citing Bazemore v. Friday*, 478 U.S. 385, 400 & n.10 (1986).

In particular, the panel's conclusion that the submitted evidence of racial prejudice regarding access to capital was "particularly striking," Resp. at 21, clearly demonstrates the panel's gutting of strict scrutiny. In thirteen citations of "evidence" that race discrimination caused disparate access to capital, the court noted whether "all other factors were equal" in only three.[4] Pet. App. at 37-38 (Grown & Bates report, Ando article, CCCD survey). As to those three, moreover, the panel made no effort whatsoever to ensure that the "experts" had actually considered even some of the major contributory factors, let alone all of them. *Id.* Had the panel not departed from the holdings of other circuits, the panel would have been forced to examine the data and methods behind those "expert" statements because, as the Seventh Circuit observed, "an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."

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[4] The other ten bits of "evidence" on which the panel relied consisted solely of parroting conclusory statements made before Congress. Pet. App. at 35-38. Giving credence to this "evidence" contravenes this Court's admonition in *Croson* that "highly conclusionary statement[s] of proponent[s] of the Plan that there was racial discrimination in the construction industry . . . are of little probative value in establishing identified discrimination . . . . " 488 U.S. 469, 500.

Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (1989).

The panel's dependence on local studies such as Brimmer & Marshall's in Atlanta (Pet. App. at 43, on which Respondents rely heavily, Resp. at 22) further exposes the panel's evisceration of strict scrutiny. Long before the panel, and then Respondents, cited it as "particularly striking" evidence of deliberate discrimination, that study had been thoroughly discredited. Suffering as it does from two "insurmountable" flaws, "the Brimmer-Marshall Study fails to provide a strong basis in evidence of discrimination against [D]BEs to justify [a] racial and ethnic preference program."[5] *Webster v. Fulton County*, 51 F.Supp.2d 1354, 1357, 1368-70 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267, 1267 (11th Cir. July 19, 2000). By its refusal to do what this Court and other circuits have mandated, the panel has not just "erroneously applied the law to the facts"; it has obliterated the law altogether, necessitating this Court's supervisory review.[6]

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[5] First, the "study proceeds on the premise that a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences by a local government in whatever area is involved." Second, the report contained "no statistical analysis of other factors that may affect minority business enterprise availability and utilization." *Id*. The same flaws pervade the putative "strong evidence of compelling interest" in this case, despite Respondents' contention that Congress need not make local findings before imposing race-based classifications in that locale. Resp. at 19-20.

[6] These observations call for *certiorari* despite Respondents' various contentions that: the panel's decision does not conflict with the law of other circuits, Resp. at 13; that the panel did not address whether the "strong evidence" requirement applies to Congress, Resp. at 14-15; that the panel is the first court to have construed the revised regulations and other courts are now in the processes of doing so, Resp. at 16; or that Adarand "mostly ignores the numerous ways" in which Respondents believe the

Even if this case were an instance of mere misapplication of evidentiary standards or constitutional tests, Resp. at 14, *certiorari* should still be granted because this case is directly analagous to cases in which this Court granted *certiorari* for the express purpose of reviewing such misapplications. *E.g., United States Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 453 (1986) (Court "granted certiorari in order to consider the [petitioner's] claim that . . . the Court of Appeals . . . grossly misapplied the substantial evidence test"); *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 147 (1981) ("Because we conclude that the court below misapplied the prevailing standard for finding a waiver of the State's immunity under the Eleventh Amendment, we grant a writ of certiorari and reverse"). Furthermore, in this very case, this Court granted *certiorari* to review application of the mootness standard by this same panel and reversed without benefit of briefs on the merits or argument.[7] Pet. App. at 1113.

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program to be narrowly tailored, Resp. at 24. These contentions are all fallacious because, as described above, the strict scrutiny requirement of looking behind conclusory statements is unavoidable, irrespective of the text of the challenged statute or regulation. Further, this Court wrote in this very case, "we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," that is, in the same way. Pet. App. at 231.

[7] This Court's most recent decision in this case also answers Respondents' assertion that the Comptroller General's need to review the DBE program this year counsels against *certiorari*. Resp. at 17. Even if the Comptroller were to abolish the program, which seems highly unlikely given its history, that would merely render the program "capable of repetition yet evading review," Respondents' regulatory gymnastics notwithstanding. Pet. App. at 108.

II. Certiorari Should Be Granted Because There Is No Barrier To Adarand's Challenge Of The Validity Or Applicability Of The New TEA-21 Regulations.

Respondents, like the panel below, contend that the new TEA-21 regulations rescue the challenged statutes from constitutional infirmity. *E.g.*, Resp. at 7. Respondents also contend, alternatively, that it is too late for Adarand to challenge the applicability or validity of the regulations, or that Adarand lacks standing to do so. Resp. at 28. Those contentions fail because the race-based presumptions of disadvantage are required by federal statute; the new regulations impermissibly nullify them; and there is no barrier to Adarand's assertion of these arguments.

Despite Respondents' remarkable insinuation to the contrary, Resp. at 28, the presumption that members of certain racial and ethnic minorities are disadvantaged is, in fact, "mandatory" under the challenged federal statutes. *E.g.*, Pet. App. at 307 (SBA § 8(d): " . . . *shall presume* that . . . disadvantaged individuals include" specified minorities). Further, the meaning of the phrase "shall presume" in this statutory context is perfectly clear. "A presumption is an assumption of fact resulting from a rule of law which *requires* such fact to be assumed from another fact or group of facts found or otherwise established. . . . " Uniform Rules of Evidence, Rule 13, *quoted in* 9 *Wigmore on Evidence* § 2493f (1981) (citing A.L.I. Model Code of Evidence Rule 701(1,2)) (emphasis added). Thus, "if a basic fact ([race]) is established, the factfinder *must accept* that the presumed fact ([disadvantage]) has also been established, unless the presumption is rebutted." 1 Weinstein's Federal Evidence § 301.02[1] (2nd Ed. 2000) (emphasis added); *accord*, 9 *Wigmore on Evidence* § 2491 (1981); 2 *McCormick on Evidence* § 346 (5th Ed. 1999). Accordingly, one cannot simultaneously maintain a presumption while demanding actual evidence of the presumed fact. The presumption of delivery of properly posted mail, for example, affirmatively precludes any demand that the mailing party produce evidence that a letter actually reached its addressee unless and until some other party shows evidence

that the letter did not arrive. *See McCormick*, § 343 at 439. It is therefore nonsense to assert, as Respondents do, that the government presumes an Hispanic woman is disadvantaged while simultaneously demanding that she prove it.[8]

Because the new regulations lead to such a nonsensical result, they are void. US-DOT may not nullify this clear statutory mandate by contrary regulation. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989). ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself[; e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.") "A regulation which does not carry into effect the will of Congress as expressed by the statute, but operates to create a rule out of harmony with the statute, is a mere nullity." *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582, 614 n.2 (1983) (internal brackets omitted), *quoting Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The invalidity of the new regulations is quite apparent from a comparison between Respondents' own argument and this Court's most recent opinion in this case. The last time this Court saw this case, Colorado had attempted to promulgate regulations fundamentally identical to the self-certification scheme newly set forth in 49 C.F.R. Part 26. Both

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[8] Attempting to escape this conundrum, Respondents assert that "the presumption continues to operate" because a sworn statement of social disadvantage, somehow, is not "actual proof." Resp. at 28. An affidavit or sworn certification is certainly evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts"); Fed. R. Civ. Pro. 56(e). Therefore, since the basic fact of race is already established, the requirement for a further attestation of disadvantage—under penalty of prosecution for fraud—is certainly a requirement for evidence in contravention of the presumption, which obviously does not "continue to operate."

this Court and US-DOT itself, however, pronounced Colorado's self-certification scheme illegal. First, this Court described the commandments of TEA-21 and SBA § 8(d), emphatically noting the statutory requirement that "the certifying entity *presume* [certain racial minorities] to be socially disadvantaged. . . . " Pet. App. at 104 (emphasis in original). Then, this Court observed that "Colorado . . . did away with the presumption of social disadvantage . . . and in its place substituted a requirement that all applicants certify on their own account that each of the firm's majority owners has experienced social disadvantage. . . . " *Id.* at 106. Accordingly, in a *per curiam* opinion this Court unanimously decried the "patent incompatibility" of such self-certification schemes with the federal law—the same law challenged here. Pet. App. at 110. Now this time, both Respondents and the panel below describe the new TEA-21 regulations in terms indistinguishable from this Court's description of Colorado's failed plan: "[US-]DOT currently requires *all* individuals claiming to be disadvantaged to certify . . . that they in fact are socially and economically disadvantaged. . . . " Resp. at 3 (emphasis in original). This comparison reveals that US-DOT's new regulations are void and therefore provide no safe haven from constitutional challenge of the underlying statutes.

Stunningly, Respondents ignore that they themselves have concluded that the presumptions are mandatory and that, consequently, self-certification schemes are illegal. Rejecting Colorado DOT's proposed self-certification scheme, US-DOT plainly stated in a letter to Colorado DOT:

> Not only the [US-DOT]'s regulation, but also the statutes that mandate it, require the use of a presumption of social and economic disadvantage. . . . [US-DOT] does not have the authority to permit a recipient of its funds to ignore a statutory requirement. . . . [I]n its most recent decision in the *Adarand* litigation, the Supreme Court specifically noted the conflict between these requirements and the CDOT program . . . The proper use of the presumption of disadvantage is fundamental . . . .

Reply App. at 2-3. Respondents cannot now be allowed to reverse their view on this subject in an attempt to avoid this Court's review.

Respondents' attempt to escape their own conclusion by asserting that Adarand has not challenged the regulations before now, and that therefore the argument is barred. Resp. at 28. That assertion is without merit because the test for whether this Court should consider an argument is whether the issue in question formed any part of "the basis for the decision below." *Matsushita Elect. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1979). In this case, the new regulations formed the very foundation of the panel's decision below. *E.g.*, Pet. App. at 59. As a result, arguments regarding the validity and applicability of those regulations are properly before this Court.

Respondents' half-hearted feint at a standing challenge also fails, because the regulations have not changed in any way relevant to standing analysis. Simply reiterating the statutory requirements, the new regulations still purport to determine eligibility for preferences in contracting and still require Adarand—regardless of whether anyone challenges its certification—to prove a number of specific facts about its owner.[9] No such requirements apply to members of certain minority groups. 49 C.F.R. § 26.67 and Appendix E (2000). An a result, Adarand continues to have standing to challenge these regulations because this Court held unequivocally that this imbalance in certification requirements results in Adarand's inability to compete on an equal footing. Pet. App. at 201-212. Coupled with the established likelihood that Adarand will continue to bid against certified DBEs, this Court held, unequal footing is all that is required for standing. *Id.*

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[9] Pursuant to TEA-21 §§ 1101(b)(2)(B) and (b)(4), repeated in 49 C.F.R. § 26.67(d) and Appendix E, Adarand would have "the burden of demonstrating . . . , by a preponderance of the evidence, that [it is] socially and economically disadvantaged," which would require Adarand to submit proof of a detailed series of specified facts and circumstances. *Id.*

Adarand's standing is therefore the law of the case and cannot now be denied in order to save Respondents from further and final review by this Court.

III. Disuse Of The SCC Is Irrelevant To Whether Certiorari Should Be Granted Because Adarand Also Challenges The Statutory Scheme That Gave Rise To The SCC.

Respondents assert, yet again, that this case is limited to a challenge of the subcontractor compensation clause that is no longer part of US-DOT's regulatory scheme. Resp. at 4. As it has been from the start, that assertion is factually inaccurate and legally impermissible. Adarand's first Complaint and its Amended Complaint both sought "a judgment that [the challenged highway funding statutes], the regulations promulgated thereunder *and* the contract provisions" are unconstitutional. Reply App. at 5, 8 (emphasis added). The challenged statutes included SBA § 8(d), which now comprises the operative core of TEA-21's DBE provisions. Reply App. at 8; Pet. App. at 300, 307. Guided by this Court's instructions on remand, the District Court below correctly recognized that Adarand had challenged the statutes. Pet. App. at 160-61.

CONCLUSION

For these reasons, *certiorari* should be granted.

Respectfully submitted,

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[SEAL]

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

March 28, 20000

Mr. Thomas F. Norton
Executive Director
Colorado Department of Transportation
EO Center
4201 East Arkansas Avenue
Denver, CO 80222

Dear Mr. Norton:

I am writing to respond to the program waiver proposals made by the Colorado Department of Transportation (CDOT) in its submission of a disadvantaged business enterprise (DBE) program to the U.S. Department of Transportation. The Department's DBE regulation (49 CFR part 26, at §26.15(b)) authorizes the Secretary of Transportation to grant program waivers under specified conditions.

[Redacted]

CDOT's second waiver proposal would absolve CDOT from implementing §26.67(d) with respect to individual determinations of social and economic disadvantage. This paragraph of the rule provides that firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (e.g., white males) may apply for DBE certification. Recipients are to make a case-by-case determination of whether such individuals are socially and economically disadvantaged. The applicant has the burden of proof as to his social and economic disadvantage.

Portions of CDOT's DBE program submission appear consistent with this regulatory requirement. The certification application form in Attachment B to the DBE program provides that, unlike applicants who are presumed to be disadvantaged, other applicants must submit an affidavit demonstrating the basis of their claim of disadvantage. Other language in the program, however, suggests that CDOT intends not to require an individual showing of disadvantage by individuals who are not presumed to be disadvantaged. The effect of this language, as well as that of the waiver request, is to extend the presumption of disadvantage to all applicants.

Not only the Department's regulation, but also the statutes that mandate it, require the use of a presumption of social and economic disadvantage and specifically limit the applicability of that presumption to certain designated groups. The Department does not have the authority to permit a recipient of its funds to ignore a statutory requirement. I would note that in its most recent decision in the *Adarand* litigation, the Supreme Court specifically noted the conflict between these requirements and the CDOT program (*Adarand Constructors, Inc. v. Rodney Slater, Secretary of Transportation, et al.*, 2000 U.S. Lexis 505, at p. 4.).

As specifically provided in the first sentence of §26.15(b), recipients may apply for a program waiver "of any provision of Subpart B or C of this part . . . " Section 26.67(d) is found in Subpart D, and it is consequently outside the portion of the DBE regulations from which program waivers may be granted. Even if, procedurally, the Department could consider a waiver request on this subject, or even if the request were styled as a request for an

exemption rather than for a waiver, the Department could not grant it. The proper use of the presumption of disadvantage is fundamental to the implementation of the statutes upon which the DBE regulation is based. For these reasons, your second waiver request is denied, and CDOT must implement its DBE program consistently with the Department's regulations.

I look forward to continuing the partnership between the Department and CDOT as we implement the DBE program. If you have any questions, please feel free to contact me or the Department's General Counsel, Ms. Nancy McFadden, at 202-366-4702.

Sincerely,

/s/ Rodney E. Slater
Rodney E. Slater

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. **90-1413**

ADARAND CONSTRUCTORS, INC. a Colorado Corporation,

Plaintiff,

(Filed Aug. 10, 1990)

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration, and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

COMPLAINT AND JURY DEMAND

COMES NOW Plaintiff, ADARAND CONSTRUCTORS, INC., by and through its attorneys, Mountain States Legal Foundation, and for its complaint against Defendants, alleges as follows:

[Redacted]

23. As a direct result of STAA, STURAA, the regulations promulgated thereunder, and the contract provisions established as a result of STAA, STURAA, and the regulations, as enforced by the defendants, Plaintiff has been denied the award of specialty subcontract work on account of the gender, race, sex or national origin of its operator. If STAA, STURAA, the regulations and contract provisions were declared unconstitutional, Plaintiff could bid for and receive contracts free from discrimination on account of gender, race, sex or national origin.

[Redacted]

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief:

1. Entry of a judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations are facially unconstitutional;

2. Entry of judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations, are unconstitutional as they are applied and thus deprive Plaintiff of rights secured by the Constitution and Laws of the United States;

3. Entry of judgment declaring that the Federal highway program administered by the Central Federal

Lands Highway Division violates the rights of Plaintiff under the Constitution of the United States;

4. Entry of Judgment permanently enjoining Defendants from discriminating in the future on the basis of gender, race, sex or national origin in the administration of federal highway contracts;

5. Entry of Judgment awarding costs and attorneys fees to Plaintiff pursuant to 42 U.S.C. § 1983; and

6. For such other and further relief as to the Court seems just and equitable in the premises.

[Redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-K-1413

ADARAND CONSTRUCTORS, INC. a Colorado Corporation,

Plaintiff,

v.

FEDERICO PEÑA, Secretary of the Department of Transportation, RODNEY E. SLATER, Administrator of the Federal Highway Administration VINCENT F. SCHIMMOLLER, Administrator of Region VII of the Federal Highway Administration, and LARRY C. SMITH, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

(Filed Jan, 22, 96)

FIRST AMENDED COMPLAINT

COMES NOW Plaintiff, ADARAND CONSTRUCTORS, INC., by and through its attorneys, Mountain States Legal Foundation, and for its first amended complaint against Defendants, alleges as follows:

[Redacted]

31. As a direct result of STAA, STURAA, ISTEA, § 8(d) of the SBA and 15 U.S.C. § 644(g) and the regulations promulgated thereunder, and the contract provisions established as a result of STAA, STURAA, ISTEA, § 8(d) of the SBA and 15 U.S.C. § 644(g) and the regulations, as enforced by the defendants, Adarand has been denied the award of specialty subcontract work on account of the race or national origin of its operator. If STAA, STURAA, ISTEA, § 8(d) of the SBA, 15 U.S.C. § 644(g), the regulations, and contract provisions were declared unconstitutional, Adarand could bid for and receive contracts free from discrimination on account of race or national origin.

[Redacted]

PRAYER FOR RELIEF

WHEREFORE, Adarand respectfully requests that this Honorable Court grant the following relief:

1. Entry of a judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d) and 15 U.S.C. § 644(g) and the regulations promulgated thereunder and the contract provisions promulgated pursuant to those statutes and the regulations are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand of rights secured by the Constitution and Laws of the United States;

2. Entry of judgment declaring that the Federal highway program administered by the CFLHD in the State of Colorado violates the rights of Adarand under the Constitution of the United States;

3. Entry of Judgment permanently enjoining Defendants from discriminating in the future on the basis of race or national origin in the administration of federal highway contracts in the State of Colorado;

4. Entry of Judgment awarding costs and attorneys fees to Adarand; and

5. For such other and further relief as to the Court seems just and equitable in the premises.

DATED this 22nd day of January, 1996.

[Redacted]

Supreme Court, U.S.
FILED
DEC - 6 2000
CLERK

(3)

No. 00-730

In The
SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

RODNEY E. SLATER, Secretary of Department of Transportation, *et al,*
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. *AMICUS CURIAE* ON BEHALF OF PETITIONER

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19 pp

QUESTION PRESENTED

Does societal discrimination constitute a compelling interest to enact a race-conscious remedy?

A. Was the government's evidence of compelling interest materially different from that in *Croson* and *Fullilove*?

B. Was the government's interest sufficiently compelling to justify a program of numerical proportionality?

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities iii

Interest of the Amicus Curiae 1

Statement of the Case 2

Summary of Argument 2

Reasons For Granting the Writ 3

I. Societal Discrimination Does Not Constitute A Compelling Interest To Enact A Race-Conscious Remedy 3

A. The Government's Evidence of Compelling Interest Was Not Materially Different From That In *Croson* And *Fullilove* 3

B. The Government's Interest Is Not Sufficiently Compelling To Permit A Program Of Numerical Proportionality 9

Conclusion 13

TABLE OF AUTHORITIES

CASES Page

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 2

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ..... *passim*

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*

International Salt Co. v. United States, 332 U.S. 392 (1947) 12

Metal Workers v. EEOC, 478 U.S. 412 (1986) 11

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 12

Shaw v. Hunt, 517 U.S. 899 (1996) 9, 10, 11

Swann v. Charlotte-Mecklenberg Bd. of Education, 402 U.S. 1 (1971) 11

Teachers v. Hudson, 475 U.S. 292 (1986) 12

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 2

United States v. Paradise
480 U.S. 149 (1987).....11, 12

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986).....10, 12, 13

STATUTES

Public Works Employment Act,
91 Stat. 117 (1977) 4, 9

Small Business Act, § 8(d)(1), 15 U.S.C.
§ 637(d)(1)..... 4

OTHER

Minority Enterprises and Allied Problems
of Small Businesses H.R. Rep. No. 94-1791
(1977), H.R. Rep. No. 94-468 (1975)..... 8

Appendix - The Compelling Interest For
Affirmative Action in Federal Procurement,
61 Fed. Reg. 26060 (1996) 8

INTEREST OF THE AMICUS CURIAE [1]

Amicus Curiae, the Southeastern Legal Foundation, Inc., is a non-profit public interest organization that shares an interest in the proper construction and enforcement of the laws and the Constitution of the United States. The Southeastern Legal Foundation was established in Georgia for the purpose of participating in the public policy process. In addition to legislative initiatives and promulgation of programs designed to inform and educate the public, the organization endeavors to influence public policy through litigation.

The *amicus* opposes the institutionalization of racism in America that results from race based preferences. The *amicus* believes that, as Justice Stevens wrote, "a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race [and] can only exacerbate rather than reduce racial prejudice." *Fullilove v. Klutznick*, 448 U.S. 448, 545, (1980) (dissenting). In other words, as Justice Brennan wrote, "preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

institutional inequities, such a policy may imply to some of the recipients' inferiority and especial need for protection." *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-74, (1977) (concurring in part). Instead, as Justice Scalia wrote in this very case, "under our Constitution there can be no such thing as either a creditor or debtor race[;] That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based upon race, or based upon blood." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (*Adarand III*).

The *amicus* therefore supports the Petitioner in opposing the use skin color to exclude certain individuals from public contracting. The important public policy questions that such exclusions raise, and that form the basis of the *amicus* interest in this case, relate to equal protection under the laws.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

The evidence in this case in support of a compelling interest to adopt a program of numerical proportionality is not qualitatively significant from that before the Court in *Croson* and *Fullilove*. Therefore, the issue of congruence under the Fourteenth and Fifth Amendments is crisply presented. The case is not appropriate for decision based on differences in the respective records.

Imposition of a remedy of numerical proportionality on the community at large is not an

appropriate response in the absence of identified discrimination by actors or against victims.

Remedies which are so ageless in the past as to be based in any part, on Richmond, Virginia's role as the capital of the Confederacy, as in *Croson*, or as timeless in the future as the essentially similar "temporary" programs at issue in *Fullilove* enacted in 1977, should now be removed from consideration by all governmental agencies.

REASONS FOR GRANTING THE WRIT

I.

Societal Discrimination Does Not Constitute A Compelling Interest In Enacting A Race-Conscious Remedy

A.

The Government's Evidence Of Compelling Interest Was Not Materially Different From That In *Croson* And *Fullilove*

The evidence introduced in support of the government's compelling interest was essentially the same in *Fullilove, Croson* and this case. In each case, there was evidence that minority-owned firms faced difficulties in competing for government contracts because of societal forces. In each case the governmental body concluded that the difficulties were the result of discrimination. The result was the same in each case: promulgation of a

program designed to provide contracting opportunity proportional to the availability of minority firms.

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the subcontractor compensation clause:

> The [SBA]...declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals,...shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality." App. at 65.

The quantity of paperwork cited by the government was probably greater in this case. Qualitatively, that is analogous to loudly repeating the same point to the speaker of a foreign language.

The record in the Court of Appeals consisted of the following:

1. The tendency of company owners to pass ownership of their companies to members of their families instead of members of minority groups, App. at 34-35;

2. The difficulty people with no experience have in joining a union in order to gain the experience needed to compete with established non-minority companies, App. at 35.

3. The difficulty of obtaining access to capital in the absence of a credit history or collateral, App. At 35.

4. The tendency of prime contractors to work with subcontractors they already trust because they have worked with those subcontractors before, App. at 39-40;

5. "Bid shopping," a practice by which prime contractors allow trusted former subcontractors to see and beat any lower bid from new, untested firms trying to replace those former subcontractors before, App. at 40;

6. The inability of new enterprises to obtain bonding because they lack experience, which in turn hampers their ability to gain experience, App. at 41-43; and

7. The inability of new market entrants to receive special pricing arrangements from suppliers from whom they have never purchased anything before, App. at 43-44.

In *Croson*, the record consisted of the following:

1. The City of Richmond's history of public and private racial discrimination including serving as the Capital of the Confederacy in the Civil War. 488 U.S. at 529, (Marshall, J. Dissenting).

2. Few, if any, minority members of trade associations. Id..

3. Receipt of few construction dollars by minority firms. Id.

4. Testimony that discrimination had been widespread in the local construction industry. Id.

5. Studies relied on in *Fullilove* to show discrimination in the construction industry. Id.

6. National discrimination. Id.

   a. Deficiencies in working capital. Id.

   b. Inability to meet bonding requirements. Id.

   c. Lack of a track record.

   d. Lack of an awareness of bidding opportunities.

   e. Unfamiliarity with bidding procedures.

   f. Pre-selection of bidders.

   g. Procurement officers using discretion to disfavor minority businesses.

7. Remedial nature of program. Id. at 478 (O'Connor, J.)

8. To promote wider participation. Id. at 713 (O'Conner, J.)

In *Fullilove* the identified factors were:

1. Need to provide a fair opportunity to participate. 448 U.S. at 459.

2. Disparity between minority population and participation in dollars. Id. at 459.

3. Difficulty of minorities in understanding the bidding process. Id. at 461, 467.

4. Deficiencies in working capital of minority-owned firms. Id. at 467.

5. Inability of minority-owned firms to meet bonding requirements. Id. at 467.

6. Inadequate track record of minority-owned firms. Id. at 467.

7. Lack of awareness of bidding opportunity by minority-owned firms.

8. Pre-selection of minority-owned firms. Id. at 467.

9. Exercise of discretion to disfavor minority-owned businesses. Id. at 467.

In *Fullilove*, the Congress had before it a report that presented the basis for the legislation, "Minority Enterprises and Allied Problems of Small Business, H.R. Rep. No. 94-1791 (1977) and an earlier version, H.R. Rep. No. 94-468 (1975). These reports functioned like "The Compelling Interest" in this case and the testimony and documentary production at the City Council hearing in *Croson*. See, Appendix – The Compelling Interest For Affirmative Action in Federal Procurement, 61 Fed. Reg. 26060 (1996).

In *Fullilove*, the 10% goal program, which had been adopted pursuant to the Public Works Employment Act of 1977, was described as "temporary." 448 U.S. at 547-48 (Stevens, J., dissenting) But as the history of the Federal programs reflected in the instant case demonstrates, amorphous standards applied to minority contracting will have no terminus when not firmly anchored in evidence of either a particular offender or an identifiable victim of discrimination.

B.

The Government's Interest Is Not Sufficiently Compelling To Permit A Program of Numerical Proportionality.

The Court of Appeals cited *Croson* and *Shaw v. Hunt*, 517 U.S. 899, 909 (1996), for the proposition that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." App. at 25, citing *Croson*, 488 U.S. at 498-506 (O'Connor, J.) [2]

The Court of Appeals concluded that this was such a case in which a race-conscious remedy was appropriate. The stated reason was that:

> "the programs before us impose a significantly more flexible and less intrusive remedy—a voluntary subsidy as opposed to a fixed set-aside subject to waiver."

App. at 20.

Such a conclusion is erroneous for two reasons. First, it is not factually correct. In *Adarand*, the contractor, Mountain Gravel & Construction, was obligated by contract to achieve the prescribed goal, was subject to penalty if he did not, and merely chose to be compensated under the SCC because the contract met the requirements for the financial assistance.

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[2] Justice O'Connor's opinion in *Croson* does not contain the language quoted from *Shaw*.

The second reason that a race-conscious remedy is inappropriate here is that the evidence in this case, like that in *Croson* and *Fullilove* fails to identify the discrimination with the necessary particularity. The record reflects societal discrimination and generalized assertions of discrimination.

As Justice O'Connor noted in *Croson*

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings" sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry. Supp.App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant*, supra, at 275, 106 S.Ct., at 1847 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

488 U.S. at 498.

As the Chief Justice stated in *Shaw v. Hunt*, supra:

> A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. *Croson*, 488 U.S., at 498-506, 109 S.Ct., at 724-728. For that interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be "'identified discrimination.'" Id., at 499, 500, 505, 507, 509, 109 S.Ct., at 724-725, 725, 728, 729, 730. "While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Id., at 504, 109 S.Ct., at 727. A generalized assertion of past discrimination in a particular industry or region is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Id., at 498, 109 S.Ct., at 724 (opinion of O'Connor, J.).

517 U.S. at 909.

Cases involving race-conscious distinctions in various contexts have been approved. See e.g. *United States v. Paradise*, 480 U.S. 149 (1987)(hiring goal); *Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971)(school desegregation); *Metal Workers v. EEOC*, 478 U.S. 412 (1986). Each of these cases involved a remedy imposed on a violator and benefiting a victim.

There are clear distinctions between the race-conscious remedies which have been approved and programs of numerical proportionality.

The hiring goal remedy in *Paradise* was described as "temporary," and applied only if the governmental body failed to provide a promotion procedure that does not have an adverse impact on minorities. 480 U.S. at 184.

A key distinction between the remedies in the employment and desegregation cases arises when the remedy is opposed on an offender rather than the public.

> A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of "reasonableness." The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution.

480 U.S. at 192 (Stephens, J., Concurring), citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-698, 98 S.Ct. 1355, 1368, 55 L.Ed.2d 637 (1978). See also *International Salt Co. v. United States*, 332 U.S. 392, 400-401, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947); *Teachers v. Hudson*, 475 U.S. 292, 309-310, n. 22, 106 S.Ct. 1066, 1077 n. 22, 89 L.Ed.2d 232 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large")(citations omitted).

However, that fails to support the Court of Appeals conclusion that if any case permits a race-conscious remedy, so does this one. Here the legislative enactment is a race-conscious preference without a particularized finding of discrimination.

"In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986).

CONCLUSION

For the foregoing reasons, the SCC and the administration of the small business DBE program of the Small Business Act should be declared unconstitutional and enjoined.

The decision of the Court should bring finality to the use of programs of numerical proportionality in government programs as a remedy for discrimination.

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No. 00-730

In The
SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

RODNEY E. SLATER, Secretary of Department of Transportation, *et al*
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF OF L. S. LEE, INC. *AMICUS CURIAE* ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED

1. Is numerical proportionality based on race a narrowly tailored remedy for societal discrimination?

2. Should the administration of the DBE program be enjoined as to both women-owned and minority owned businesses?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Interest of the Amicus Curiae 1

Statement of the Case 4

Summary of Argument 4

Reasons for Granting the Writ 5

I. Numerical Proportionality Based On Race Is Not A Narrowly Tailored Remedy For Societal Discrimination. 5

II. The SCC And The DBE Program Should Be Enjoined Both As To Women-Owned And Minority-Owned Disadvantaged Businesses. 11

Conclusion 13

TABLE OF AUTHORITIES

CASES — Page(s)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ..... *passim*

Adarand Constructors, Inc. v. Slater, ___ U.S. 120 S.Ct. 722 (2000) 4

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir., 2000) ..... *passim*

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 12

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) 12

Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*

Teachers v. Hudson, 475 U.S. 292 (1986) 9

United States v. Paradise, 480 U.S. 149 (1987) 6, 9

STATUTES

Small Business Act, § 8(d)(1), 15 USC § 637(d)(1) 5

15 USC § 644(g)(1) 12

OTHER

U.S. General Accounting Office Report
to Congressional Committees,
August, 1994, "Highway
Contracting, Disadvantaged
Business Program Meets Contract
Goal, But Refinements are Needed".
GAO/RCED-94-168 2

Appendix - The Compelling Interest For
Affirmative Action in Federal Procurement,
61 Fed. Reg. 26060 (1996) 4, 10, 11

INTEREST OF THE AMICUS CURIAE[1]

This brief is being filed on behalf of L. S. Lee, Inc. ("L. S. Lee"). L. S. Lee is a construction company doing business under its own name or related companies in New York, Delaware, Pennsylvania, Maryland, District of Columbia, Virginia, North Carolina and South Carolina. L. S. Lee is not owned by members of minority races or women who are eligible for certification as disadvantaged business enterprises (DBEs). The *amicus* does business as a contractor which installs guardrail and signs in the highway heavy construction industry and often offers to subcontract to general contractors on federally funded construction projects subject to DBE utilization programs. It is a common practice for general contractors to seek to fulfill the federally-mandated goals for DBEs by hiring minority specialty contractors. Thus non-DBE companies are disproportionately burdened in competing for sign and guardrail work on federally funded projects.

The outcome of this case is of particular interest to the *amicus* because of its exclusion from federal contracts as the result of contractors fulfilling their minority goals by hiring DBEs. As the United States General Accounting Office has documented:

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

States have generally obtained DBEs' participation through subcontracts let by prime contractors. The prime contractors are expected to meet the state's goal by subcontracting with DBEs. According to industry and state officials, DBEs tend to concentrate in specialty areas that are not capital intensive, such as landscaping, traffic control and construction and repair of signs and guardrails.

For example, with one exception, DBEs received 26 percent or more of the contract dollars awarded in each of these three areas in all four states [Colorado, Connecticut, Georgia, and Wyoming]. In each state, DBEs received 49 percent or more of the contract dollars awarded in at least two of the three areas. DBEs received 86 percent of the landscaping and 90 percent of the fencing and guardrail contract dollars in one state and 100 percent of the traffic control contract dollars in another. U. S. General Accounting Office Report to Congressional Committees, August, 1994, "Highway Contracting, Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed." GAO/RCED 94-168 at 11, 24.

The problem of exclusion of non-minority specialty contractors is enhanced as states increase their required goals to match the maximum availability of DBEs.

New DBE Goals published in the Maryland Register propose a 22.8% goal for Maryland State Highway Administration. US DOT size standards for DBEs are set at $16.6 million, a threshold significantly beyond the capability of the average guard rail specialty contractor.

North Carolina relies heavily on two women-owned business enterprise ("WBE") guardrail contractors who have participated in the program for many years, and do a majority of the available subcontract guardrail projects.

In the experience of this *amicus*, programs of numerical proportionality are not benign, but rather have a significant negative impact on non-DBE companies. In addition, there is no reliable evidence that numerical proportionality requirements in government contracts result in appreciable assistance to truly disadvantaged companies and provide no assistance to the disadvantaged.

Unfortunately, the record in this case is inadequate to permit an argument that the program at issue is not narrowly tailored by reason of its disproportionate impact on non-minority firms. But the disproportionate impact does impact the interests of this *amicus*.

The interest of the amicus is to protect similarly situated companies from (1) being excluded from government contract markets solely on the basis of race, and (2) to preserve a truly competitive environment in the construction industry in order to provide quality work at the lowest competitive cost.

The problems posed by the challenged program are not limited to the Small Business Act, but are representative of a proliferation of programs in federal procurement that have never received consideration by the legislative branch of government.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

In *Adarand Constructors, Inc. v. Slater*, ___ U.S. ___, 120 S.Ct. 722 (2000) ("*Adarand VI*"), this Court remanded the case a second time for the lower courts to rule on the existence of a compelling interest and narrow tailoring of the remedy.

In answering both questions in the affirmative, the Court of Appeals relied on the sufficiency of the Report, "Appendix. The Compelling Interest For Affirmative Action In Federal Procurement," 61 Fed. Reg. 26060 (1996). ("The Compelling Interest"). Thus, the Court is in a position to rule whether the conclusions in "The Compelling Interest" justify "affirmative action" are sufficient to justify the Subcontractor Compensation Clause ("SCC") clause and its supporting programs.

The case also affords the opportunity for the Court to rule that no numerical proportionality program is a sufficiently necessary remedy for generalized discrimination.

To assure that the justification for affirmative action includes or permits a remedy of numerical

proportionality requires a showing of necessity which is not present here.

REASONS FOR GRANTING THE WRIT

I.

NUMERICAL PROPORTIONALITY BASED ON RACE IS NOT A NARROWLY TAILORED REMEDY FOR SOCIETAL DISCRIMINATION

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the Subcontractor Compensation Clause ("SCC"):

> The [SBA]...declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals,...shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality" and found that numerical proportionality requirements based on race in Federal contracts are narrowly tailored to remedy past societal discrimination App. at 65.

The *amicus* submits that it is not a permissible remedial purpose to create a system of race-based

preferences designed to achieve participation to the maximum practicable extent by race-designated companies in Federal contracting.

The Court of Appeals reached the conclusion that the programs at issue were narrowly tailored based on its analysis of the factors identified in *United States v. Paradise*, 480 U.S. 149 (1987). (App. 54-55).

However the Court failed to consider the first of the *Paradise* factors, the necessity for the relief. (App. 54). The Court of Appeals merely noted that in *Croson* this Court had criticized "proportionality" in the form of a "rigid numerical quota". (App. 55). The Court of Appeals then moved on to consider the other *Paradise* factors without addressing the lack of a logical nexus between mandating participation of DBE's to the full extent of their availability in the market and identified past discrimination.

In his dissenting opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Stevens noted the logical fallacy in a remedy based on proportional representation:

> "At best, the statutory preference is a somewhat perverse form of reparation for the members of the injured classes. For those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong. A random distribution to a favored few is a poor form of compensation for an injury shared by many."

448 U.S. at 538-39 (Stevens, J., Dissenting).

The *amicus* is aware that Justice Stevens dissented in *Adarand III*, 515 U.S. at 242. That gives pause to any rush to cite Justice Stevens' opinion in *Fullilove*. Indeed, Justice Stevens distinguishes the program at issue in *Fullilove* as being more objectionable than the current one. 515 U.S. at 258 (Stevens, J., dissenting.) However, implicit in the Tenth Circuit's opinion and "The Compelling Interest" is the idea that if any race-conscious action is appropriate any remedy is appropriate, or at least a program of numerical proportionality. The *Fullilove* dissent is the most direct expression by any member of the Court of the need for a logical nexus between the remedy of numerical proportionality and the discrimination that some may have suffered. For this reason, the *amicus* suggests that this material be revisited.

Further, as Justice Stevens noted, the necessity for a remedial program of numerical proportionality is negated by several factors.

> "Assuming, however, that some firms have been denied public business for racial reasons, the instant statutory remedy is nevertheless demonstrably much broader than is necessary to right any such past wrong. For the statute grants the special preference to a class that includes (1) those minority-owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well; (2) firms that have never attempted to obtain any public business in the past; (3) firms that

were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions; (4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated to the racial characteristics of their stockholders; and (5) those firms that have been victimized by racial discrimination.

Since there is no reason to believe that any of the firms in the first four categories had been wrongfully excluded from the market for public contracts, the statutory preference for those firms cannot be justified as a remedial measure. And since a judicial remedy was already available for the firms in the fifth category, it seems inappropriate to regard the preference as a remedy designed to redress any specific wrongs. In any event, since it is highly unlikely that the composition of the fifth category is at all representative of the entire class of firms to which the statute grants a valuable preference, it is ill-fitting to characterize this as a "narrowly tailored" remedial measure."

Id. at 540-41. (Footnotes Omitted.)

Adarand makes a compelling argument that the government has not identified discrimination with the specificity that justifies any race-based remedy. The necessity for any race-based "remedy" in this case is far less specifically identified than the hiring criteria

approved in *Paradise*[2] and reaffirmed in *Adarand III*, 515 U.S. 200, 237.

However, from the conclusion that some sort of race-conscious remedy might be permissible, it is a larger leap to justify the type of proportional representation approved by the Court of Appeals in this case. As this Court stated in *Adarand III*:

> ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with Justice Stevens that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, supra, at 533-535, 537. We think that requiring strict scrutiny is the best way to ensure

[2] *Paradise* involved a judicial remedy imposed on an offender, not a legislative enactment imposing a racial preference on the community at large. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large. *Teachers v. Hudson*, 475 U.S. 292, 309-10 n. 22 (1986).

> that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means.

Id., 515 U.S. at 326.

The Court of Appeals concludes that a race-based government program is narrowly tailored not through a detailed examination, but rather through deference to a government report which does not even examine the means of the results of proportional participation.

The program countenanced in *Fullilove* was described as a "temporary measure". 448 U.S. at 547-48 (Stevens, J., dissenting). This case has been in the courts for ten years. The government's response to this Court's decision in *Adarand III* was to issue the report upon which the Court of Appeals grounded its decision, "Appendix—The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26050 (1996) ("The Compelling Interest"). This report semantically used such terms as "affirmative action" and use of race as a "factor" in public procurement, 61 Fed. Reg. at 26050, to justify by implication the remedial program of proportional participation at issue here. See Id. at 26062. Continuously, the report is silent on the need to include programs of proportional participation as acceptable affirmative action.

Experience has shown that no generalized definition of strict scrutiny by this Court is going to dissuade administrative agencies from implementing programs of proportional participation based on race. *Fullilove* in 1980, *Croson* in 1989, and *Adarand III* in 1996 have had no measurable influence on the universe of

government programs utilizing requirements for proportional participation.

The heavy reliance by the Court of Appeals on "The Compelling Interest" and its justification for "affirmative action" fails to justify a program of numerical proportionality.

II.

THE SCC AND THE DBE PROGRAM SHOULD BE ENJOINED BOTH AS TO WOMEN-OWNED AND MINORITY OWNED DISADVANTAGED BUSINESSES

The *amicus* suggests that the judgment should be reversed with final judgment ordered Adarand. The government articulated its findings in the record below. There is no suggestion that the program is remedial or narrowly tailored to affect a compelling interest.

The *amicus* have no objection to small business aid programs involving competitive bidding without racial classifications.

If the SCC and the DBE programs are enjoined only as to racial minorities, the effect will be to leave it in force as to women-owned DBEs ("WBEs"). Thus the governmental agency would still have a 5% statutory goal and a 12-15% DBE goal which would be satisfied primarily by women-owned businesses.

The *amicus* suggests that the WBE component of the statute is such an integral part of the program that it should be enjoined as part of the remedy fashioned by the court.

> If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902). Even when Congress has included a separability clause, the court eschews giving the statute "an effect altogether different from that sought by the measure viewed as a whole." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

Section 502 of the Small Business Act proscribes a minimum DBE participation goal of 5% of the total value of all prime contract awards. 15 U.S.C. § 644(g)(1). The participation minimum is expressed in the aggregate: Congress did not specify how much of the goal must be comprised of minority-owned versus women-owned business, but clearly contemplated a mixture of both. Because the participation goal has been expressed as an aggregate, and not distinctly allocated between minority-owned and women-owned businesses, the provisions of the SCC and DBE as they apply to racial minorities and women are interdependent, and must both be stricken if one is found unconstitutional.

CONCLUSION

For the foregoing reasons, the SCC and the administration of the small business DBE program of the Small Business Act should be declared unconstitutional and enjoined.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE TENTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S DECISIONS IN *ADARAND* AND *CROSON*	6
II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER FEDERAL COURT OF APPEALS DECISIONS	14
CONCLUSION	20

TABLE OF AUTHORITIES

Page

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Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995) ..... *passim*
Adarand Constructors, Inc. v. *Peña*, 965 F. Supp. 1556 (D. Colo. 1997), *vacated*, 169 F.3d 1292 (10th Cir. 1999), *reversed and remanded*, 528 U.S. 216 (2000) 3,4
Associated Gen. Contractors of Ohio, Inc. v. *Drabik*, 214 F.3d 730 (6th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3419 (U.S. Dec. 14, 2000) (No. 00-976) 15,16,17,18
Boos v. *Barry*, 485 U.S. 312 (1988) 7
Braxton v. *United States*, 500 U.S. 344 (1991) 5
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 14
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) ..... *passim*
Civil Rights Cases, 109 U.S. 3 (1883) 13
Concrete Works of Colo., Inc. v. *Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) 17
Contractors Ass'n of E. Pa., Inc. v. *City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997) 15,17
Engineering Contractors Ass'n of S. Fla., Inc. v. *Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) 15,16
Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 8,12,19
Lutheran Church-Missouri Synod v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), *further opinion on rehearing*, 154 F.3d 487 (D.C. Cir. 1998) 18,19,20
MD/DC/DE Broadcasters Ass'n v. *FCC*, No. 00-1094, 2001 WL 32786 (D.C. Cir. Jan. 16, 2001) 19
Metro Broad., Inc. v. *FCC*, 497 U.S. 547 (1990) 14
Monterey Mech. Co. v. *Wilson*, 125 F.3d 702 (9th Cir. 1997) 20
Romer v. *Evans*, 517 U.S. 620 (1996) 14
Texas v. *Johnson*, 491 U.S. 397 (1989) 7

TABLE OF AUTHORITIES—Continued

Page

United States v. *Eichman*, 496 U.S. 310 (1990) 7,8
United States v. *Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000) 13,14
United States v. *Paradise*, 480 U.S. 149 (1987) 16
W.H. Scott Constr. Co. v. *City of Jackson*, 199 F.3d 206 (5th Cir. 1999) 15,16,19

Constitution:

U.S. Const. amend. I 7
U.S. Const. amend. V 5
U.S. Const. amend. XIV, § 5 13,14

Statutory Provision and Rules:

Small Business Act, 15 U.S.C. § 644(g)(1) 18
S. Ct. R. 10(a) 5
S. Ct. R. 37.2(a) 2
S. Ct. R. 37.6 1

Other Authorities:

Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,050 (1996) 9
George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting after* Croson, 21 Harv. J.L. & Pub. Pol'y 793 (1998) 12
Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (1998) 11,12
Statement by the President (Sept. 28, 2000) 6

IN THE

Supreme Court of the United States

No. 00-730

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

RODNEY SLATER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC"), is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry.[1] AGC has more than 100 state and local

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Associated General Contractors of America, Inc., or its members made a monetary contribution to the preparation or submission of the brief.

chapters, with at least one chapter serving the general contractors and related firms in each State, and one chapter in Puerto Rico. AGC's approximately 32,000 regular and associate members engage in the construction of highways, bridges, tunnels, airports, dams and other water conservation projects, water works and waste treatment facilities, and defense facilities.

AGC has long supported open competitive bidding for public construction contracts. That system typically requires interested contractors to submit sealed bids by a specified date and time. It also requires the government agency to open all bids publicly and to award the contract to the lowest responsive and responsible bidder. For these reasons, open competitive bidding typically precludes discrimination based on race or ethnicity, and AGC vigorously opposes any such discrimination. AGC has helped and will continue to help its chapters offer training and other assistance to minority firms.

AGC participated previously in this case by filing amicus curiae briefs in this Court and in the Tenth Circuit. *See Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000) (decision below). AGC argued in these briefs that the federal government's use of the Subcontractor Compensation Clause ("SCC"), which financially rewards general contractors for engaging subcontractors owned by persons of certain races, is subject to, and cannot survive, strict scrutiny. In conflict with decisions of this Court and other courts of appeals, the Tenth Circuit below held otherwise.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

Following this Court's decisions and remands in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000), the Tenth Circuit in this case upheld "the constitutionality of the use in federal subcontracting of the Subcontractor Compensation Clause ('SCC'), which employs race-conscious presumptions designed to favor minority enterprises and other 'disadvantaged business enterprises' ('DBEs')." Pet. App. 3.

Although the district court had considered earlier versions of the programs at issue, the Tenth Circuit's primary holding was that "the SCC program and the DBE certification programs *as currently structured* * * * pass constitutional muster." *Id.* at 4 (emphasis added).[2] Observing that "Adarand seeks only prospective declaratory and injunctive relief," *id.* at 10, the court of appeals thought it proper to address the current SCC program because, as the court saw it,

> [t]o ignore intervening changes in the statutory and regulatory framework underlying this litigation would be to shirk our responsibility to strictly scrutinize the real-world legal regime against which Adarand seeks prospective relief. The changes in the law are squarely before us today, and we discern no reason to leave their scrutiny to future litigation, in effect prolonging the instant litigation * * *. [*Id.* at 11.]

Although it upheld the current versions of the SCC and DBE programs, the Tenth Circuit also held that these same programs "as they were structured in 1997, when the district

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[2] The government had advised the court that the SCC is no longer in use in federal highway construction procurement contracts, *see* Pet. App. 12 n.4, 17, 97, but the Tenth Circuit reviewed "the current SCC" (*id.* at 79) because it could not be assured that the government would not resume its use of that program. *See id.* at 10-12.

court last rendered judgment," were *not* narrowly tailored and thus failed strict scrutiny. *Id.* at 4. The Tenth Circuit saw fit to pass on the old regime because, in its words, "[i]t is not fanciful to suggest that the government may retreat to prior practice, but if the government did so, this opinion expressly holds that such an action would be unconstitutional." *Id.* at 12-13.[3]

Adding still to the scope of its decision, the Tenth Circuit indicated that its judgment was meant to resolve the constitutionality of the statutes underlying the SCC program both on their face and on an as-applied basis. *See id.* at 14 ("[W]e * * * address the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality.") (emphasis in original). The broad sweep of the Tenth Circuit's decision was no doubt a reflection of the court's express desire to dispose of this case *in toto*. *See id.* at 18 ("[W]e share wholeheartedly [the] sentiment that the time has come for this litigation to come to an end.").

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[3] Insofar as the Tenth Circuit held unconstitutional the old SCC program for lack of narrow tailoring, it agreed with the district court's holding in *Adarand Constructors, Inc.* v. *Peña*, 965 F. Supp. 1556 (D. Colo. 1997), *vacated*, 169 F.3d 1292 (10th Cir. 1999), *reversed and remanded*, 528 U.S. 216 (2000). Indeed, the Tenth Circuit "emphasize[d] [its] substantial agreement with much of the district court's judgment as it pertains to the versions of the statutes and regulations in place in 1996." Pet. App. 18. (The district court had memorably observed that the program was so poorly tailored that even "the Sultan of Brunei would qualify" for a preference. *Id.* at 191 n.17.). In light of the Tenth Circuit's "substantial agreement" with the district court's judgment, it is unclear why the court did not affirm in part the district court's judgment. Instead, it simply reversed.

SUMMARY OF ARGUMENT

Although this Court held in *Adarand* that the constitutional command of equal protection contained in the Fifth and Fourteenth Amendments requires that "*all* racial classifications, imposed by whatever federal, state, or local governmental actor," Pet. App. 231 (emphasis added), be judged under the exact same test—strict scrutiny—the Tenth Circuit in this case upheld a racially discriminatory federal contracting preference based on evidence that clearly would not have survived strict scrutiny had it been offered in support of a race-based program enacted by a state or locality. This watered-down version of strict scrutiny cannot be reconciled with the strict scrutiny analysis applied by other circuit courts in connection with the review of state and local programs similar to the federal program at issue here. Thus, the critically important question presented in this case is whether strict scrutiny means one thing when applied to the federal government and something else when applied to every other governmental body.

As explained below, the Tenth Circuit's decision conflicts with this Court's decisions in *Adarand* and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), as well as with the recent decisions of other circuit courts which, unlike the court below, have held race-based contracting preferences unconstitutional. This Court should therefore grant review of the Tenth Circuit's decision. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

There can be no question about the importance of the constitutional issues raised in this case by the government's decision to classify American citizens according to race. *See* S. Ct. R. 10(a); *see also* Pet. App. 126-127 ("We acknowledge that * * * this case does implicate constitutional issues of substantial importance."). Indeed, this Court has already

granted the writ in this case on two occasions, and the decision below was sufficiently important that it prompted President Clinton to issue a formal written statement in which he applauded the Tenth Circuit for upholding "a major affirmative action program." Statement by the President (Sept. 28, 2000).

ARGUMENT

I. THE TENTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S DECISIONS IN *ADARAND* AND *CROSON*.

The first reason why the writ should be granted is that the Tenth Circuit's decision cannot be squared with this Court's *Adarand* and *Croson* decisions. In *Adarand* this Court held that strict scrutiny applies to federal racial classifications, and in *Croson* this Court demonstrated how such scrutiny is to be performed in the context of a race-based contracting preference. The scrutiny applied here by the Tenth Circuit was, however, far less strict than that applied by this Court in *Croson*. Thus, the decision below cannot be reconciled with both *Adarand* and *Croson*: If the scrutiny the Tenth Circuit applied was not intended to be strict, the court violated the central command of *Adarand*. And if the court did intend to apply strict scrutiny, it failed, in fact, to do so and thus violated *Croson*.

In *Adarand*, this Court held that there is a unitary standard of review for all racial classifications—no matter what body or level of government imposes the classification. *See* Pet. App. 227 ("any person, of whatever race, has the right to demand that *any* governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny") (emphasis added). The exact same test applied to a state or local government's racial classification must also be applied to "congressional racial classifications." *Id.* at 233. Thus, as Justice Stevens correctly recognized in his dissent, under

Adarand "there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or municipality." *Id.* at 258.

After holding in *Adarand* that strict scrutiny must be applied to the SCC and DBE programs at issue here, this Court "remand[ed] the case to the lower courts for further consideration in light of the principles we have announced" without deciding whether these programs could withstand such scrutiny. *Id.* at 243. The Court thus did not perform the strict scrutiny analysis that it held was required. *Cf. id.* at 246 (Scalia, J., concurring) ("It is unlikely, if not impossible, that the challenged program would survive under [my] understanding of strict scrutiny").

Nevertheless, prior to *Adarand*, this Court in *Croson* had analyzed under strict scrutiny a minority set-aside program enacted by the City of Richmond and had held the program unconstitutional under that test. Accordingly, if *Adarand* means anything, it means that the federal government's SCC and DBE programs must be subjected to the same rigorous scrutiny applied in *Croson*. Strict scrutiny cannot mean one thing when applied to the federal government and something else when applied to every other unit of government.[4] As

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[4] In no area of constitutional law of which we are aware does the same test mean something different when applied to the federal government than when applied to a state or locality. The flag burning cases are an example. In *Texas* v. *Johnson*, 491 U.S. 397 (1989), this Court subjected Texas' flag desecration statute, a content-based speech restriction, to " 'the most exacting scrutiny' " under the First Amendment, *id.* at 412 (quoting *Boos* v. *Barry*, 485 U.S. 312, 321 (1988))—which means, just as it does in the equal protection context, that a speech restriction must be narrowly tailored to serve a compelling governmental interest, *see Boos*, 485 U.S. at 321. One year after *Johnson*, the Court in *United States* v. *Eichman*, 496 U.S. 310 (1990), applied the exact same analysis to the *federal* Flag Protection Act of 1989. *See id.* at 314-315. And

shown below, however, the analysis applied by the Tenth Circuit in this case was far less strict than the analysis applied in *Croson*.[5] More than anything else, the Tenth Circuit's analysis resembles the deferential analysis applied in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980)—which *Adarand* rejected. *See* Pet. App. 241 (insofar as "*Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling").

To satisfy strict scrutiny, "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 240-241. The compelling interest offered by the government in support of the SCC and DBE programs, and accepted by the Tenth Circuit, was the interest in remedying the effects of past and present discrimination against minority contractors. *See id.* at 24-27. Thus, as the Tenth Circuit correctly recognized, *Croson* required the government to come forward with "a strong basis in evidence" to support its conclusion that remedial action is necessary. *Id.* at 29 (citing *Croson*, 488 U.S. at 500).

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neither the Court nor the *Eichman* dissenters suggested that the scrutiny should be any less exacting simply because it was enacted by Congress. On the contrary, so clear was it that the same analysis would apply to the federal statute that "[t]he only remaining question [was] whether the Flag Protection Act is sufficiently different from the Texas statute." *Id.* at 315.

[5] The scrutiny applied by the Tenth Circuit was also—by its own admission—less strict than that applied by the district court in this case. Responding to the district court's statement that it is "difficult to envisage a race-based classification that is narrowly tailored," Pet. App. 189, the Tenth Circuit stated that the district court had "effectively pronounc[ed] strict scrutiny fatal in fact," *id.* at 7, and that "we disagree with the district court's effectively fatal standard of scrutiny," *id.* at 78.

Based on the government's showing, the Tenth Circuit made the sweeping pronouncement that "the construction contracting market is overwhelmingly composed of non-minorities due to the effects of racial discrimination." *Id.* at 53 n.18.[6] The Tenth Circuit held that the government has a compelling interest in conferring on minority contractors preferences unavailable to non-minorities—no matter how "personally innocent" the non-minorities disadvantaged by the preferences are. *Id.* at 52.

The Tenth Circuit said that the requisite strong basis in evidence was to be found "particularly" (*id.* at 54) in a document printed in the Federal Register. *See id.* at 31 (citing Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,050 (1996)). The Appendix, which was prepared by the Justice Department in the wake of *Adarand*—and with an eye toward the litigation to follow from this Court's 1995 remand—purports "to summarize the evidence that has been assembled to date on the compelling interest question" and "the legislative record that underpins the acts of Congress that authorize affirmative action measures in procurement." 61 Fed. Reg. 26,050. *See* Pet. App. 31 (the Appendix "cit[es] approximately thirty congressional hearings since 1980 concerning minority-owned businesses"). In the Tenth Circuit's view, the Appendix was

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[6] Some of the allegedly discriminatory barriers facing minorities cited by the Tenth Circuit are actually race-neutral, such as "old boy networks," the "lack of familial connections," the fact that few minorities "have families from whom they can inherit a construction business," and the difficulties encountered by "new entrants" in the market. Pet. App. 34, 35, 39. At certain points in its opinion, the Tenth Circuit seemed to lose sight of the relevance for present purposes of the distinction between racial discrimination and other problems faced by minority contractors. *See id.* at 40 (referring to "the insularity and *sometimes outright racism* of non-minority firms in the construction industry") (emphasis added).

evidence of a congressional "finding" (*id.*) that historical and present discrimination by various private actors (specifically, prime contractors, unions, lenders, customers, business networks, suppliers, and bonding companies) has impeded both the formation of minority subcontracting businesses and the ability of such businesses once formed to compete for subcontracts. *See id.* at 33-44.

The Tenth Circuit also drew upon the so-called "disparity studies" cited in the Appendix. *Id.* at 44. Commissioned by certain state and local governments, these studies claim to find a statistically significant disparity between the availability of minority-owned business for construction work and the actual utilization of such businesses. *See id.* at 44-48.[7] The Tenth Circuit concluded that this evidence "raise[d] an inference that the various discriminatory factors the government cites have created that disparity," *id.* at 46, even though "[t]he government's review of those studies reveals that * * * such disparity was *least* glaring in the category of construction subcontracting." *Id.* at 45 (emphasis added).

Under *Croson*, the congressional materials and disparity studies discussed in the Appendix and relied upon by the Tenth Circuit are plainly insufficient to establish a strong basis in evidence for the government's contention that a racially discriminatory federal contracting preference is needed to combat present discrimination in the construction industry or the lingering effects of historical discrimination against minority contractors.

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[7] In *Croson*, a plurality of the Court indicated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509 (opinion of O'Connor, J.).

With respect to the Tenth Circuit's reliance upon Congress' "finding" of discrimination in the construction industry, the congressional materials cited in the Appendix are far too general to establish a compelling interest in a nation-wide program applicable to virtually all racial minorities in every type of construction business. That is, Congress has not made findings with respect to specific geographic areas in which discrimination is a problem, the specific racial groups against which discrimination has been perpetrated, or the specific sectors of the construction industry pervaded by discrimination.[8]

The lack of such particularized findings is fatal under *Croson*. There, like the government and the Tenth Circuit here, "the city and the District Court relied on Congress' finding * * * that there had been nationwide discrimination in the construction industry," but this Court held that "[t]he probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited," adding that "[i]f all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504. *See also id.* at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry

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[8] It is important to recognize that there is not a single, nationwide market for most government contracts. Although the rare contract for a new fighter-bomber would attract national attention and bidders regardless of location, a contract for a guardrail in Colorado surely would not. Indeed, when it established benchmarks and price evaluation adjustments for use in federal procurements, the Department of Commerce considered the construction industry on a region-by-region basis rather than on the national basis on which other industries were evaluated. Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (1998).

provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.").[9]

If a congressional finding of discrimination can provide the strong basis in evidence necessary to justify a racially discrimination contracting preference, such a finding must be far more detailed and specific than any finding Congress has made to date. *See* Pet. App. 232-233 (" '*Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute.' ") (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)) (emphasis added by the *Adarand* Court).

The disparity studies cited by the government and relied upon by the Tenth Circuit are also insufficient to establish the requisite strong basis in evidence needed to support a national racial contracting preference. Assuming that each and every such study performed to date is methodologically sound and probative of discrimination—a *highly* questionable assumption at best[10]—these studies would not support

[9] Owing to the lack of evidence of discrimination in the mountain states, the Department of Commerce has not authorized a price evaluation adjustment for small disadvantaged business in the construction industry in that area. *See* 63 Fed. Reg. at 35,714.

[10] In fact, none of the disparity studies cited by the government and the Tenth Circuit has undergone and survived final (as opposed to interlocutory) judicial scrutiny. In recent years, a number of race-based contracting preferences in such places as Columbus, Dade County, Houston, and Philadelphia have been struck down despite the disparity studies offered in support of them. Conversely, *not one* federal appellate court has accepted a disparity study as valid on a fully developed factual record. *See* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting after* Croson, 21 Harv. J.L. & Pub. Pol'y 793, 797 (1998) (noting that "many of these studies do not meet standards established by federal courts").

the enactment of a national program because a *national* disparity study has never been conducted. Rather, all of the studies were performed at the "state and local" level. Pet. App. 44. Of course, such limited evidence cannot justify the implementation of a racially discriminatory contracting preference on a national scale. As this Court said in *Croson*, "[w]e have never approved the extrapolation of discrimination in one jurisdiction from the experience of another." 488 U.S. at 505.

The Tenth Circuit defended its departure from a strict *Croson* analysis based in part on Section 5 of the Fourteenth Amendment. Although the court "declin[ed] to address the precise relationship between § 5 of the Fourteenth Amendment and the power of Congress, acting through the Executive branch, to address racial discrimination by the states," Pet. App. 25-26, the court opined that Section 5 "grants Congress broad remedial powers in the area of discrimination," *id.* at 27—broader than the powers of states and localities. *See id.* at 77 n.25 ("[T]he geographic scope of the remedial powers of a local government, as in *Croson*, and that of Congress's remedial powers under § 5 of the Fourteenth Amendment differ.").

The Tenth Circuit did not explain, however, how its view of Section 5 can be reconciled with this Court's cases (not cited by the court below) holding that Section 5 authorizes Congress to redress only discriminatory action *by the states*, not by private individuals. *See United States* v. *Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 1755-56 (2000) ("[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. * * * Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."). In *Morrison* the Court recalled that in the *Civil Rights Cases*, 109 U.S. 3 (1883), "we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to

purely private conduct, were beyond the scope of the § 5 enforcement power." *Morrison*, 120 S. Ct. at 1756. *See also City of Boerne* v. *Flores*, 521 U.S. 507, 524-525 (1997); *Romer* v. *Evans*, 517 U.S. 620, 628 (1996) ("it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodation"). *Cf.* Pet. App. 234-235 (not addressing the Section 5 issue).

Drawing on the Appendix, the Tenth Circuit found evidence that minority contractors have been discriminated against by *private actors* in the construction industry; but it cited no evidence whatsoever that states or state officials have engaged in discriminatory conduct. Furthermore, like the federal statute at issue in *Morrison* found to be outside of the scope of Congress' Section 5 power, the SCC "is directed not at any State or state actor" and it "visits no consequences whatever on any [state] public official." *Morrison*, 120 S. Ct. at 1758.[11] Accordingly, Section 5 cannot be raised in defense of the SCC. *Cf. Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 605-606 (1990) (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.").

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER FEDERAL COURT OF APPEALS DECISIONS.

The Tenth Circuit's decision conflicts not only with *Adarand* and *Croson* but also with the post-*Adarand* decisions of other federal circuit courts holding unconstitutional race-based contracting preferences enacted by states and subdivi-

[11] The Court in *Morrison* also deemed the federal statute at issue there beyond the Section 5 power because the statute "applie[d] uniformly throughout the Nation" and was not "directed only to those States in which Congress found that there had been discrimination." 120 S. Ct. at 1759. This analysis also applies here.

sions thereof. *See Associated Gen. Contractors of Ohio, Inc.* v. *Drabik*, 214 F.3d 730 (6th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3419 (U.S. Dec. 14, 2000) (No. 00-976); *W.H. Scott Constr. Co.* v. *City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997). Indeed, the Tenth Circuit itself acknowledged that some of these very cases could be read to conflict with its decision and stated that, if so, "we reject their holdings." Pet. App. 48 n.14.

In *Drabik*, the Sixth Circuit held that Ohio's Minority Business Enterprise Act was not supported by a compelling interest. Although Ohio offered statistical evidence of racial discrimination against minority contractors that the court viewed as "stronger * * * than the statistics in *Croson*," the Sixth Circuit held that Ohio's proof was "still insufficient." 214 F.3d at 736. As the Sixth Circuit explained:

> The deficiencies of the data are glaringly clear. Much of it is severely limited in scope (ODOT contracts) or is irrelevant to this case (ODOT purchasing contracts). As noted previously, the data does not distinguish minority construction contractors from minority businesses generally, and *a fortiori* makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size. And * * * Ohio * * * concedes that "AGC showed that the State had not performed a recent study." [*Id.*]

The Sixth Circuit also held that

> The only cases found to present the necessary "compelling interest" sufficient to "justif[y] a narrowly tailored race-based remedy" are those that expose, as in the case of the Alabama Department of Public Safety in 1987,

> "pervasive, systematic, and obstinate discriminatory conduct," *Adarand*, 515 U.S. at 237 (citing *United States* v. *Paradise*, 480 U.S. 149 (1987)). Ohio has made no such showing. [214 F.3d at 737.]

In *W.H. Scott Construction Co.* the Fifth Circuit rejected the disparity study commissioned by the City of Jackson, Mississippi, and offered in support of the City's DBE program. The court explained that

> Had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support [its] 15% DBE-participation goal. [199 F.3d at 219.]

It is evident that the Fifth Circuit in *W.H. Scott Construction Co.* and the Sixth Circuit in *Drabik* demanded far more specific evidence and findings than did the Tenth Circuit in this case, and that the evidence offered by the government here clearly would not have passed muster under the strict scrutiny analysis of those two circuits. Nor was the statistical evidence accepted by the Tenth Circuit subjected to anything close to the kind of careful scrutiny applied by the Eleventh Circuit to the data before it in *Engineering Contractors Association of South Florida, Inc., supra*. *See* 122 F.3d at 912-924.[12] Plainly, the Tenth Circuit has set the bar far lower than has the Fifth, Sixth, and Eleventh Circuits.[13]

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[12] In affirming the district court's conclusion that Dade County's statistical data "was insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference," 122 F.3d at 924, the Eleventh Circuit agreed with the plaintiffs that "the disparities illustrated by the County's statistical analysis * * * are better explained by firm size than by discrimination. The plaintiffs point out that minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id.* at 916.

[13] The decision below conflicts with *Drabik* in still another respect. The court below considered "[p]ost-enactment evidence"—*i.e.*, evidence found or created after the enactment of the program under review—stating that such evidence was "particularly relevant" in this case. Pet. App. 30 n.11. *See also Concrete Works of Colo., Inc.* v. *Denver*, 36 F.3d 1513, 1529 n.23 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995). *Drabik*, however, rejected the relevance of post-enactment evidence. *See* 214 F.3d at 738 ("[U]nder *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute *in advance of its passage*; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding.") (emphasis added).

The decision below also conflicts with the leading Third Circuit case. In *Contractors Association of Eastern Pennsylvania, Inc.*, the Third Circuit held that "a court cannot conduct the strict scrutiny review required by *Croson* without first identifying with specificity the discrimination allegedly giving rise to the compelling state interest." 91 F.3d at 599. The court noted that "in the course of this litigation, * * * several distinct forms of racial discrimination have been advanced," namely (1) "discrimination by prime contractors in the awarding of subcontracts," (2) "discrimination by contractors associations in admitting members," and (3) "discrimination by the City in the awarding of prime contracts." *Id.* The Third Circuit thus held that "[s]ince these three forms of discrimination involve discrimination by different decisionmakers in different markets, *we must independently determine whether there is a strong basis in the evidence for believing that each particular form of discrimination existed.*" *Id.* (emphasis added). The Third Circuit then closely examined the statistical evidence in support of each alleged form of discrimination. *See id.* at 599-605. In sharp contrast, the Tenth Circuit did nothing of the sort in this case.

The Tenth Circuit's narrow tailoring analysis also conflicts with *Drabik*, in which the Sixth Circuit held that the Ohio statute at issue

> suffers from defects both of over and underinclusiveness. By lumping together the groups of Blacks, Native Americans, Hispanics, and Orientals (and leaving unclear the exact extent of the last two designations), the [Ohio statute] may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. Thus, the [Ohio statute] is satisfied if contractors of, let us say, Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. [214 F.3d at 737.]

The exact same charges could be leveled against the SCC program, but the Tenth Circuit did not do so. Evidently, the tailoring demanded by strict scrutiny need not be as narrow in the Tenth Circuit as it must be in the Sixth.

Finally, the decision below conflicts with the D.C. Circuit's decision holding unconstitutional a race-based *federal* program. *See Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), *further opinion on rehearing*, 154 F.3d 487 (D.C. Cir. 1998).

As this Court and the Tenth Circuit have observed, the Small Business Act establishes a "Government-wide goal for participation" by minority contractors in "not less than 5 percent of the total value of all prime contract and subcontract awards for each year." 15 U.S.C. § 644(g)(1). *See* Pet. App. 205, 15. Meanwhile, the statutes authorizing the relevant appropriations—known by the acronyms STURAA, ISTEA, and TEA-21—set a 10% goal. *See id.* at 16. The district court held these goals unconstitutional, *see id.* at 198 ("I find the statutory sections containing these goals insufficiently narrowly tailored"), but the Tenth Circuit reversed on this point, holding that "the 5% and 10% goals incorporated

in the statutes at issue here, unlike the set-asides in both *Fullilove* and *Croson*, are *merely aspirational and not mandatory*. Therefore, while the goal may well be relevant to the * * * strict scrutiny inquiry, we disagree with the district court that the goal itself is unconstitutional." *Id.* at 66 (citation omitted) (emphasis added).

This holding directly conflicts with the D.C. Circuit's decision in *Lutheran Church-Missouri Synod*, which held unconstitutional "aspirational and not mandatory" federal minority hiring goals. In that case the D.C. Circuit applied *Adarand* to FCC affirmative action regulations establishing as a goal for radio station license holders that they hire minority and female employees in relation to their availability in the area labor force. *See* 141 F.3d at 351-352 (the FCC regulations are "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation"). In defense of the regulations, the FCC and the Justice Department argued that the "regulations stop short of establishing preferences, quotas, or set-asides." *Id.* at 351. The D.C. Circuit, however, held that it was irrelevant whether the regulations imposed a quota or merely a goal. The court explained that

> we do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race. [*Id.* at 354.]

See also MD/DC/DE Broadcasters Ass'n v. *FCC*, No. 00-1094, 2001 WL 32786 (D.C. Cir. Jan. 16, 2001) (applying strict scrutiny and finding unconstitutional FCC rule mandating recruitment targeted at minorities).

The Fifth Circuit agrees with the D.C. Circuit on this issue. *See W.H. Scott Constr. Co.*, 199 F.3d at 215 ("We agree with the district court * * * that it is irrelevant whether [a racial

classification] establishes 'goals' or 'quotas' for DBE participation. As the D.C. Circuit noted [in *Lutheran Church-Missouri Synod*], the distinction is immaterial"). *See also Monterey Mech. Co.* v. *Wilson*, 125 F.3d 702, 712 (9th Cir. 1997) ("there is no de minimis exception to the Equal Protection Clause"). The Court should grant the writ to resolve this conflict and the other conflicts described above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 00-730

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination?

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest?

LIST OF PARTIES

By operation of law, Secretary of Transportation Norman Y. Mineta has replaced Rodney Slater as a Respondent in this case, who in turn replaced Federico Peña. Furthermore, Kenneth Wykle was a Respondent in his capacity as Administrator of the Federal Highway Administration ("FHA"), but that office is currently vacant. Finally, the Department of Transportation has undergone large scale reorganization, which renders it unclear to Petitioner who, if anyone, replaced former Respondents Vincent F. Schimholler, who was Administrator of Region VIII of the FHA, and Larry C. Smith, who was Division Engineer of the Central Federal Lands Highway Division, as Respondents. All parties are sued in their official capacities.

Petitioner Adarand Constructors, Inc. has no parent or subsidiary companies. No publicly held company owns ten percent or more of the stock of Adarand Constructors, Inc.

TABLE OF CONTENTS

	Page
Table of Authorities	vi
Opinions Below	1
Basis of Jurisdiction	1
Constitutional Provisions Involved	1
Statutes and Regulations Involved	1
Statement of the Case	2
A. Facts	2
B. Procedural History	3
C. Statutory Regime	7
1. Definitions	7
2. Certification Procedures	9
3. DBE Participation Goal Setting	3
4. DBE Participation Goal Achievement	4
D. Misconceptions	15
Summary of the Argument	17
Argument	18
I. This Court Should Adopt The Harlan Doctrine And Hold That There Can Never Be A Compelling Interest In Preferential Treatment Of Racial Groups In Government Contracting	18
II. The Panel Misapplied The Compelling Interest Test By Finding That DOT Had Met Its Burden Of Production Of A "Strong Basis In Evidence" That Race Discrimination Caused Racial Disparity In Highway Construction In At Least A Majority Of States	23

TABLE OF CONTENTS – Continued

Page

A. A Strong Basis In Evidence Must Demonstrate That Race Discrimination Caused Any Observed Racial Disparity In Highway Construction, But The Panel Failed To Investigate Causation 28

B. A Strong Basis In Evidence For This Nationwide DBE Program Requires Strong Evidence Of Deliberate Racial Discrimination In Highway Contracting In At Least A Majority Of States, But By The Federal Government's Own Reckoning, There Is Not Even A Disparity In 42 States 33

C. A Strong Basis In Evidence Must Demonstrate That Congress Had Compiled The Requisite Evidence *Before* It Enacted TEA-21, But To The Extent Congress Made Any Findings At All, They Show Impermissible Motive And Lack Of Evidence, And By The Federal Government's Own Reckoning, The Requisite Evidence Still Does Not Exist 35

III. The Panel Misapplied The Narrow Tailoring Test By Finding That A Mandatory Presumption Is Not Overinclusive, That Race-Based Highway Contracting Was A Last Resort Solution For Difficulties In Capital Access, And That This Still-Expanding, Decades-Old Program Is Of Appropriately Limited Duration 39

A. DOT Failed To Submit The Requisite Strong Evidence That TEA-21 Even Permits Individualized Inquiry Into Disadvantage, Let Alone Whether The Regulations Actually Provide For It 41

TABLE OF CONTENTS – Continued

Page

1. TEA-21 On Its Face Precludes The Requisite Strong Evidence Of Individualized Inquiry By Mandating That Disadvantage Be Presumed Instead Of Proven 41

2. Even If Regulations Could Provide For Individualized Inquiry Despite The Presumption, DOT's Regulations Do Not: There Is No Real Inquiry, And The Determination Of Identity And Membership Of Racial Groups Entitled To The Presumption Is Irreparably Arbitrary 43

B. DOT Failed To Submit The Requisite Strong Evidence That Congress Tried Even The Obvious Race Neutral Options Before Enacting TEA-21 45

C. Lacking Individualized Inquiry, There Can Be No Appropriate Limit To Duration, And Even If There Could Be, The Evidence In Appendix A Supports None; The DBE Program Is A Safe Harbor For Discrimination, Not A Remedy 47

Conclusion 50

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Bazemore v. Friday, 478 US 385 (1986) 31

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 US 356 (2001) 33

Brown v. Board of Educ., 347 US 483 (1954) 19

Bush v. Vera, 517 US 952 (1996) 35

City of Boerne v. Flores, 521 US 507 (1997) 33

City of Richmond v. Croson, 488 US 469 (1989) ... *passim*

Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 US 627 (1999) 33

Fullilove v. Klutznick, 448 US 448 (1980) 17

Kimel v. Fla. Bd. of Regents, 528 US 62, 120 S.Ct. 631 (2000) 22, 33, 37

Korematsu v. United States, 323 US 214 (1944) 19

Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 US 789 (1984) 42

Miller v. Johnson, 15 US 900 (1995) 36

Regents of Univ. of Cal. v. Bakke, 438 US 265 (1978) 39, 45, 47

Rice v. Cayetano, 528 US 495, 120 S.Ct. 1044 (2000) 19

Shaw v. Hunt, 517 US 899 (1996) 35

United Jewish Organizations v. Carey, 430 US 144 (1977) 21

United States v. Larionoff, 431 US 864 (1977) 42

TABLE OF AUTHORITIES – Continued

Page

United States v. Morrison, 529 US 598, 120 S.Ct. 1740 (2000) 22, 33

United States v. Paradise, 480 US 149 (1987) 23

Wygant v. Jackson Bd. of Educ., 476 US 267 (1986) 47

FEDERAL CIRCUIT COURT CASES

Adarand Constructors, Inc. v. Slater, et al., 228 F.3d 1147 (10th Cir. 2000) 1

Adarand v. Peña, 16 F.3d 1537 (10th Cir. 1994) 3

Assoc'd Gen. Contractors of Ohio v. Drabik, 214 F.3d 730 (6th Cir. 2000) 26, 30, 36, 44

Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3rd Cir. 1996) 26, 39, 50

Engineering Contractors of S. Fla. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997) 26, 27

Fallis v. Kerr-McGee Corp., 944 F.2d 743 (10th Cir. 1991) 30

Goode v. City of Austin, 202 F.3d 265 (5th Cir. 1999) (table), *cert. denied*, 120 S.Ct. 1996 (2000) 21

H.K. Porter Co., Inc. v. Metropolitan Dade County, 975 F.2d 762 (11th Cir. 1992) 50

Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996) 39, 41

J. Edinger and Son, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986) 50

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) 30

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992) 26

TABLE OF AUTHORITIES – Continued

Page

Lutheran Church-Missouri Synod v. F.C.C., 141 F.3d 344 (D.C. Cir. 1998) 40

Middleton v. City of Flint, Michigan, 92 F.3d 396 (6th Cir. 1996) 29

Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333 (7th Cir. 1989)..... 30

Monterey Mechanical Co. v. Wilson, 138 F.3d 1270 (9th Cir. 1998)..... 40

Multnomah Legal Services Workers Union v. Legal Services Corp., 936 F.2d 1547 (9th Cir. 1991) 26

O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)..... 26

Qualley v. Clo-Tex Intern., Inc., 212 F.3d 1123 (8th Cir. 2000) 25

Smith v. Virginia Commonwealth Univ., 84 F.3d 672 (4th Cir. 1996)..... 31

United States v. Gould, 536 F.2d 216 (8th Cir. 1976) 26

United States v. Wolny, 133 F.3d 758 (10th Cir. 1998) 25

W.H. Scott Constr. Co., Inc. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999)..... 32, 40, 50

Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 969 (2000) 24, 30, 45

Webster v. Fulton County, 51 F.Supp.2d 1359 (N.D. Ga. 2000), *aff'd*, 218 F.2d 1276 (11th Cir. 2000)..... 26, 32

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998)..... 30, 31

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997)..... 45

TABLE OF AUTHORITIES – Continued

Page

FEDERAL DISTRICT COURT CASES

Adarand Constructors, Inc. v. Peña, et al., 965 F.Supp. 1556 (D. Colo. 1997)..... 1

Adarand v. Skinner, 790 F.Supp. 240 (D. Colo. 1992) 3

Arrow Office Supply Co. v. City of Detroit, 826 F.Supp. 1072 (E.D. Mich. 1993)..... 50

Assoc. for Fairness in Bus., Inc. v. State of New Jersey, 82 F.Supp.2d 353 (D.N.J. 2000)..... 49

Concrete Works v. City and County of Denver, 86 F.Supp.2d 1042 (D. Colo. 2000)..... 19, 44, 45

Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 893 F.Supp. 438 (E.D. Pa 1995)..... 26

Engineering Contractors of South Florida v. Metropolitan Dade County, 943 F.Supp. 895 (S.D. Fla. 1996)..... 26, 45

F. Buddie Contracting, Ltd. v. Cuyahoga Community College Dist., 31 F.Supp. 571 (N.D. Ohio 1998)..25, 50

In re Sherbrooke Sodding Co., 17 F.Supp.2d 1026 (D. Minn. 1998) 23

Kornhass Constr., Inc. v. Oklahoma, 2001 WL 434387 (W.D. Okla. Feb. 9, 2001) 50

Phillips and Jordan v. Watts, 13 F.Supp.2d 1308 (N.D. Fla. 1998) 50

STATUTES

Pub. L. No. 95-507 (1978)..... 48

Small Business Act, 15 USC §§ 637(a), (d), 644(g) 1, 7, 10, 13, 41

TABLE OF AUTHORITIES – Continued

Page

Transportation Equity Act for the Twenty First Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, *et seq.* ..... *passim*

REGULATIONS

13 CFR § 124.1002 (2001) 9

13 CFR § 124.103 (2001) 8, 9, 47

13 CFR § 124.104 (2001) 8

48 CFR § 19.000 (2000) 17

48 CFR § 19.1202 (2000) 14

48 CFR § 19.1203 (2000) 14

48 CFR § 19.1204 (2000) 14

48 CFR § 19.201 (2000) 13, 14, 34

48 CFR § 19.702 (2000) 13

48 CFR § 19.704 (2000) 13

48 CFR § 19.705-4 (2000) 13

48 CFR § 19.705-5 (2000) 13

48 CFR § 19.705-7 (2000) 13

48 CFR § 19.707 (2000) 13

48 CFR § 52.219-26 (1999) 14

48 CFR Subpart 19.11 (2000) 13

49 CFR § 26.1 (2000) 16

49 CFR § 26.3 (2000) 16

49 CFR § 26.5 (2000) 7, 11, 16, 44

TABLE OF AUTHORITIES – Continued

Page

49 CFR § 26.51 (2000) 16, 47

49 CFR § 26.61 (2000) 12, 16

49 CFR § 26.63 (2000) 12

49 CFR § 26.67 (2000) 8, 9, 10, 12, 42, 43

49 CFR § 26.7 (2000) 16, 47

49 CFR § 26.83 (2000) 9, 10, 16

49 CFR § 26.87 (2000) 11, 12

49 CFR Part 26, App. E (2000) ..... *passim*

RULES OF PROCEDURE AND EVIDENCE

A.L.I. Model Code of Evidence Rule 701 41

Fed. R. Civ. Pro. 56 ..... 23, 25, 42

Fed. R. Evid. 201 25

Fed. R. Evid. 802 25

Fed. R. Evid. 805 25

Uniform Rules of Evidence, Rule 13 41

FEDERAL REGISTER ENTRIES AND OTHER OFFICIAL REPORTS

49 CFR Parts 23 and 26, Participation By Disadvantaged Business Enterprises in Department of Transportation Programs; Final Rule, 64 Fed. Reg. 5096, *et seq.* (Feb. 2, 1999) 47

54 Fed. Reg. 34717 (Aug. 21, 1989) 48

57 Fed. Reg. 58288 (Dec. 9, 1992) 11

63 Fed. Reg. 54161 (Oct. 8, 1998) 14, 34

TABLE OF AUTHORITIES – Continued

Page

Benchmark Study, 63 Fed. Reg. 35714 (June 30, 1998) 34

Benchmark Study, 64 Fed. Reg. 52806 (Sept. 30, 1999) 14, 33, 34

United States General Accounting Office, *Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information Is Needed To Understand Program Impact*, June 2001 32

Participation by DBE in DOT Financial Assistance Programs, NPRM, 62 Fed. Reg. 29548 (May 30, 1997) 11, 16

Participation By DBE in DOT Financial Assistance Programs; MOU with the SBA; Uniform Form and Other Revisions, NPRM, 66 Fed. Reg. 23208 (May 8, 2001) 44, 45

Proposed Reforms to Affirmative Action In Federal Procurement, Appendix A, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey" 61 Fed. Reg. 26041, 26050 (May 23, 1996) ..... *passim*

LEGISLATIVE HISTORY

Conference Comm. Report on TEA-21, H. Rep. No. 105-550 (1998) 36

House Debate on TEA-21, 144 Cong. Rec. H2000-H2011 (April 1, 1998) 20, 38, 39

Senate Debate on TEA-21, 144 Cong. Rec. S1395-S1434 (March 5, 1998) 20, 38, 39

TABLE OF AUTHORITIES – Continued

Page

Testimony Before The House Committee on Small Businesses, Subcommittee on Gen. Oversight and Minority Enterprise Task Force on Minority Enterprise, 96th Cong. 21 (1979) 20

The Small Bus. Administration's Minority Bus. Development Program, Hearings Before the Senate Cmte. on Small Bus., 104th Cong. 42 (1995) 8

TREATISES

1 *Weinstein's Federal Evidence* § 301.02[1] (2nd Ed. 2000) 42

2 *McCormick on Evidence* § 346 (5th Ed. 1999) 42

9 *Wigmore on Evidence* § 2493f (5th Ed. 1999) 41

LAW REVIEW ARTICLES

Dr. George La Noue, *To the 'Disadvantaged' Go The Spoils*, 138 The Public Interest, Winter, 2000 at 91-98 34

OPINIONS BELOW

In this case the Court will review the opinion of the United States Court of Appeals for the Tenth Circuit entered on September 25, 2000 *sub nom. Adarand Constructors, Inc. v. Slater, et al.*, 228 F.3d 1147 (10th Cir. 2000), reproduced in Appendix to Petition for *Certiorari* ("Pet. App.") 1-97, reversing summary judgment for Adarand granted by the United States District Court for the District of Colorado *sub nom. Adarand Constructors, Inc. v. Peña, et al.*, 965 F.Supp. 1556 (D. Colo. 1997), Pet. App. 128-201.

BASIS OF JURISDICTION

Section 1254(1) of title 28 of the United States Code grants this Court jurisdiction to review the Tenth Circuit's decision in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution, which reads in pertinent part: "No person shall . . . be deprived of . . . liberty . . . without due process of law."

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case include § 1101(b) of the Transportation Equity Act for the Twenty First Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, *et seq.*, Pet. App. 300-04; and sections 8(a), 8(d) and 644(g) of the Small Business Act, 15 USC §§ 637(a), (d), 644(g), Pet. App. 305-16.

The regulations involved in this case include Small Business Administration regulations at 13 CFR Part 124; Federal Acquisition Regulations at 48 CFR Part 19; and DOT regulations at 49 CFR Part 26.

STATEMENT OF THE CASE

This case began over a decade ago when Adarand Constructors, Inc. ("Adarand") sued the Secretary of the United States Department of Transportation ("DOT") and other DOT officials (collectively, "Respondents"). Adarand challenged the federal statutory regime by which DOT awards federal highway construction contracts on the basis of race. This Court has referred to that regime as the Disadvantaged Business Enterprise ("DBE") program. This Court is familiar with the rudiments of the regime and with the undisputed facts. Certain elements of the procedural history require illumination, however, and the statutory regime has never been fully presented to this Court. It is also necessary to dispel two misconceptions regarding this case. Therefore, the facts, procedural history, statutory regime, and misconceptions are presented separately below.

A. Facts

Adarand incurred the injury that forms the basis of this case in 1989 when, as a direct result of DOT's race-based contracting practices, a prime contractor hired by DOT awarded a subcontract to a certified DBE instead of Adarand. Mountain Gravel & Construction Company ("Mountain Gravel") bid on and won the federal prime contract in question, called the West Dolores River Project, which was let directly by DOT. Among other work, the prime contract called for installation of guardrails. Gonzalez Construction Company ("Gonzales") and Adarand are both guardrail installation subcontractors. Both submitted bids to Mountain Gravel. Adarand's was lowest. As a condition of being eligible to win the prime contract, however, Congress had required each bidder to submit a detailed DBE subcontractor hiring plan, unless that bidder came within certain exceptions to that rule. Further, Congress required DOT to make the winning bidder's DBE hiring plan a material part of the contract, subject to liquidated damages for breach. DOT also

offered winning bidders, including Mountain Gravel, a ten thousand dollar bonus for hiring a DBE. Like all four of Adarand's principle competitors, Gonzalez is a certified DBE. Adarand is not. Therefore, as a result of DOT's stick and carrot arrangement, Mountain Gravel rejected Adarand's low bid and hired Gonzales. These facts are not disputed. Pet. App. 104-05.

B. Procedural History

Adarand filed this suit in 1990. From the beginning, Adarand has sought a declaration that the statutory regime that results in DOT's race-based contracting practices violates the Equal Protection requirements of the United States Constitution. Appendix to Reply to Brief In Opposition to Petition for *Certiorari* ("Reply. App.") 4-9.

The parties filed cross motions for summary judgment in April 1991. At that time, Respondents (Defendants below) filed no disparity study with the court. *See* Defendants' Brief In Support Of Their Motion For Summary Judgment, filed April 24, 1991. Nevertheless, in 1992, the United States District Court for the District of Colorado granted summary judgment to Respondents after applying only intermediate scrutiny. *Adarand v. Skinner*, 790 F.Supp. 240 (D. Colo. 1992). A panel of the Tenth Circuit affirmed two years later. *Adarand v. Peña*, 16 F.3d 1537 (10th Cir. 1994). In 1995, this Court reversed and remanded, ordering the lower courts to apply strict scrutiny to the entire regime. Pet. App. 202, 243.

On remand, the parties again filed cross motions for summary judgment in May 1996. By way of evidence in support of Respondents' motion, despite months of discovery to choose from, Respondents' attorneys prepared and filed only a short document called "Appendix I." Defendants' Memorandum In Support Of Their Motion For Summary Judgment, filed May 1, 1996 (Appendix I reprinted in its entirety at Pet. App. 367-78). Appendix I purports to summarize the legislative history of the racially discriminatory provisions of the Small Business

Act and highway funding statutes originally challenged in this case. Adarand objected that "[t]here is absolutely nothing in Appendix I that could be described as 'evidence of discrimination.' " Memorandum Of Points And Authorities In Opposition To Defendants' Motion For Summary Judgment And In Support Of Plaintiff's Motion For Summary Judgment 7 n.6., filed June 3, 1996.

Later, Respondents' attorneys composed an alleged synopsis of anecdotal evidence and disparity studies collected and conducted for entities other than Congress or DOT. Then they published their synopsis in the Federal Register as "Appendix A" to a document called "Proposed Reforms to Affirmative Action In Federal Procurement: A Preliminary Survey." 61 Fed. Reg. 26041, 26050 (May 23, 1996). The composition and publication of Appendix A was in direct response to this Court's first ruling in this case. *Id.* at 26042 ("proposal set forth herein . . . designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand* . . . "). Next, Respondents filed their attorneys' purported synopsis as an appendix to their response to Adarand's motion for summary judgment. Defendants' Memorandum In Opposition To Plaintiff's Motion For Summary Judgment And In Further Support Of Defendants' Motion For Summary Judgment 6, filed June 3, 1996. Respondents called their attorneys' work "significant evidence." *Id.* Respondents did not, however, submit any of the studies or statements their attorneys had purportedly summarized. To date, in fact, the record contains not one page of any disparity study, nor any detailed explanation of the methods used in any of the studies Respondents' attorneys cited in Appendix A. Again, Adarand pointed out that Respondents had "failed to provide the evidence upon which Congress relied in passing the race-based measures challenged in this case." Plaintiff's Reply Memorandum 7-8, filed June 17, 1996.

In 1997, the District Court denied Respondents' motion for summary judgment and granted summary judgment to Adarand instead, holding the challenged

regime unconstitutional. Pet. App. 128, 200. Respondents appealed.

In their opening brief to the Tenth Circuit, Respondents indicated that the District Court had considered their attorneys' Federal Register publication in making its decision. Brief For The Federal Appellants 13 n.12, filed Nov. 19, 1997. Adarand again objected that the only putative evidence before the District Court was Respondents' attorneys' version of the legislative history, which is not "evidence," in the legal sense, at all. Adarand further argued that unless "the evidence used by Congress to make its findings [is] presented to the Court, the Court cannot do its job." Brief For Appellee 27, 33, filed Jan. 23, 1998.

Before the panel ruled on the pending appeal, Congress once again perpetuated the DBE program when it passed the Transportation Equity Act for the Twenty First Century ("TEA-21"). TEA-21 is the current federal spending authorization act regarding highway construction and maintenance.[1] The DBE program has now been in effect for nearly a quarter of a century. *See* Pub. L. No. 95-507 (1978).

In August 1998, Respondents moved to dismiss their own appeal on grounds of mootness. Their motion was based on a state regulation then in effect in Colorado but that DOT has since stricken as illegal. Reply App. 1-3. In February 1999, before the panel ruled on that motion, DOT published a final rule changing some of the regulations that govern the continuing DBE program. 64 Fed. Reg. 5096 (Feb. 2, 1999). In March 1999, the panel held the case had indeed become moot. Pet. App. 115, 123.

In January 2000, this Court again reversed and remanded, *per curiam* and without dissent, finding that

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[1] Enacted June 9, 1998. Pub. L. 105-178, Tit. I, § 1101(b), 112 Stat. 113. TEA-21 is the successor appropriations measure to the Intermodal Surface Transp. Efficiency Act (ISTEA). 105 Stat. 1919, § 1003(b); Pet. App. 103 n.1.

the matter was not moot because it was capable of repetition but avoiding review. Pet. App. 103, 111. Ordered to resolve this case on its merits, the Tenth Circuit again assigned this case to the same panel this Court had just reversed.

The panel's first action on this second remand was to request supplemental briefs on whether the case could be moot despite this Court's decision. Order, Feb. 24, 2000. The panel also requested briefs on the relevance of the intervening regulatory changes. *Id.* The panel, however, did not give the parties any additional opportunity to address the sufficiency of the evidence before the court, such as it was.

On September 25, 2000, eleven years after Adarand lost its bid for the West Dolores guardrail contract, the panel issued its decision. Based on Appendix A—the putative evidence composed by Respondents' attorneys that the panel referred to as *"The Compelling Interest,"* Pet. App. 31, 34—the panel held the District Court had erred in granting summary judgment to Adarand. Pet. App. 1, 79. First, despite this Court's holding regarding Adarand's standing in this case, the panel declined to consider some elements of the challenged regime.[2] Then the panel found that the compelling interest of remediating race discrimination was supported by the "strong basis in evidence" presented to it only in summary form composed by Respondents' attorneys in direct response to previous rulings in this case. Pet. App. 54. Next, the panel found that the particular manner in which the bonus was paid to Mountain Gravel was not narrowly tailored. Pet. App. 79. Finally, the panel found DOT had rectified this one constitutional deficiency through regulatory changes. Pet. App. 58-60. On March 26, 2001, this

[2] The panel found Adarand had standing to challenge 15 USC § 637(d)(1-3) and § 1101(b) of TEA-21. The panel denied standing to challenge 15 USC §§ 637(a), 644(g), and 637(d)(4-6). Pet. App. 14.

Court granted *certiorari* to consider whether this race-based statutory regime survives proper strict scrutiny.

C. Statutory Regime

The statutory heart of this case is the provision of TEA-21 that mandates: "Except to the extent that the secretary determines otherwise, not less than ten percent of the amounts made available" for federal highway construction "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." TEA-21, Pub L. 105-178, § 1101(b)(1), Pet. App. 300.[3] "DBE" is simply a shorthand designation for "a small business concern owned and controlled by socially and economically disadvantaged individuals." 49 CFR § 26.5 (2000) (cited regulations reproduced in appendix hereto). Implementation of this key provision requires four steps. First, the term "DBE" requires definition. Second, there must be procedures whereby businesses become certified as DBEs. Third, the Secretary must determine whether to use the goal Congress provided in TEA-21 or some other goal. Finally, there must be some machinery for achieving the chosen goal.

1. Definitions

TEA-21 adopts the definition of "socially and economically disadvantaged individuals" from "section 8(d) of the Small Business Act (15 USC § 637(d)) and relevant subcontracting regulations pursuant thereto." § 1101(b)(2)(B), Pet. App. 300. The "relevant subcontracting regulations" are in 13 CFR Part 124, where the Small Business Administration defines "social disadvantage"

[3] The DBE participation provision of TEA-21 applies in this case because the Central Federal Lands Highway Division (CFLHD) let the West Dolores prime contract. Pet. App. 203, 211. CFLHD is a division of DOT and is funded through TEA-21. *Id.*, § 1101(a)(8).

and "economic disadvantage." Pet. App. 205. As required by TEA-21, DOT adopted these SBA definitions and reiterated them "with minor modifications" in Appendix E to 49 CFR Part 26.

Under both SBA and DOT regulations, full "disadvantaged" status depends in the first instance on "social disadvantage"; one cannot be economically disadvantaged unless one is also socially disadvantaged. 13 CFR § 124.103 (2001); 49 CFR Part 26, App. E (2000). "Economically disadvantaged individuals" are:

> socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

13 CFR § 124.103 (2001); 49 CFR Part 26, App. E (2000).[4] Because DBEs seek to enter the highway construction business, the necessary "others in the same or similar line of business" must also be in the highway construction business. *See Id.* "Socially disadvantaged individuals," in turn, are:

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[4] In addition, to qualify as economically disadvantaged one's net worth, excluding the value of one's home and business, must be less than three quarters of a million dollars. 49 CFR § 26.67(a)(2)(iii), (d); 13 CFR § 124.104(c)(2). This requirement is both nonsensical and irrelevant, however. It is nonsense because it is easily evaded. Any aspiring entrepreneur could meet the standard by shifting assets into her home or business, thereby excluding those assets from consideration. The requirement is largely irrelevant because as revealed by an SBA report to Congress in 1995, based on Federal Reserve Board data, 92% of American families would qualify under this standard even if the entire family's net worth were included. *The Small Bus. Admin.'s Minority Bus. Development Program, Hearings Before the Senate Cmte. on Small Bus.*, 104th Cong. 42 (1995).

> those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.

13 CFR § 124.103 (2001); 49 CFR Part 26, App. E (2000). Evidence of social disadvantage "must include," at a minimum, "[p]ersonal experiences of substantial and chronic social disadvantage in this American society, not in other countries." *Id.* It must also include "[n]egative impact on entry into or advancement in the business world because of the disadvantage." *Id.*

Reading these requirements together, it is apparent that to be considered both socially and economically disadvantaged for purposes of DOT DBE certification, at the very least one must have tried to do highway construction business in America. Furthermore, that attempt must have been hindered in some way by racial discrimination. By definition, persons who never made such an attempt, or who made an attempt but were not hampered by racial discrimination, cannot be socially and economically disadvantaged. They therefore cannot qualify for DBE certification.

2. Certification Procedures

An applicant may obtain DBE certification directly from either DOT or SBA, 49 CFR § 26.67(c) (2000); or from state and local recipients of DOT financial assistance, 49 CFR § 26.83(e) (2000); or from a private certifier qualified by the Small Business Administration, 13 CFR § 124.1002(a) (2001).[5] All of these certifying entities must

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[5] In November 1999, SBA and DOT signed a Memorandum of Understanding (MOU) intended to "identify reciprocal certification principles and streamline procedures for expediting the certification requirements of SBA regulations (13 CFR [P]art 124) and DOT regulations (49 CFR [Part] 26)." *See* 66

use the same basic process, the mandatory elements of which are detailed in 49 CFR § 26.83 (2000). Section 26.83 requires any eligible firm seeking DBE certification to submit an application, made under oath, and requires the certifying agency to investigate the truth of statements made in that application. Though the definition of disadvantage requires that racial prejudice hampered the applicant owners' attempt to enter the highway construction business in America, DOT does not require women and members of preferred races to make any such showing. For women and preferred races, as mandated by TEA-21, DOT simply presumes both prerequisites are met.[6] Section 8(d) of the SBA, from which TEA-21 adopts the definitions of disadvantage, commands:

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . .

15 USC § 637(d)(3)(C), Pet. App. 307. TEA-21 expands that presumption to include women as well. Pub. L.

Fed. Reg. 23208, 23209 (May 8, 2001). The MOU is available on the internet at http://osdbuweb.dot.gov/business/legislation/mem.html. Newly proposed revisions to 49 CFR Part 26 will implement the provisions of the MOU. 66 Fed. Reg. 23208, 23209 (May 8, 2001).

[6] Paradoxically, despite that the statute commands DOT to "presume" disadvantage, DOT regulations now provide that the certifying entity "must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged." *See infra*, Part III.A.1. In practice this requirement literally means nothing more than checking a box on a form and signing the form in the presence of a notary. *See* Disadvantaged Business Enterprise Program Uniform Certification Application, 66 Fed. Reg. at 23221. The regulations also require an essentially meaningless "signed, notarized statement of personal net worth" for each owner. 49 CFR § 26.67(a) (Oct. 1, 2000); *Infra*, n.4.

105-178 § 1101(b)(2)(B), Pet. App. 300. These presumptions are inescapable in the present case because in the direct procurement DBE program at issue, DOT is "the contractor."

Accordingly, every single legally admitted permanent resident or citizen of the United States who happens to be female or who can trace his origins to any of 42 specifically designated countries is automatically presumed to have attempted to enter the American highway construction business and to have experienced racial prejudice that somehow hindered that attempt. 49 CFR § 26.5 (2000). These countries include such economically distinct places as Japan, a G-7 economy, and Tuvalu, an equatorial nation consisting of ten thousand people living on less than 450 square miles of coral atolls.[7] CIA, *World Fact Book* 508-509 (2000). Men of other racial groups with more nebulous boundaries—such as "persons having origins in any of the Black racial groups of Africa" and persons of "Portuguese culture"—are likewise statutorily entitled to this presumption. 49 CFR § 26.5 (2000). DOT regulations provide that these presumptions are "rebuttable," but provide no guidance whatsoever on what evidence would be sufficient to rebut the presumption of social disadvantage. *Id.*; 49 CFR § 26.87(a)(2) (2000) (mandating only that the officer "must review . . . available information").[8]

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[7] Since 1997, "persons whose origins are from . . . Juvalu" has been listed as a racial group entitled to the presumption of social and economic disadvantage. 62 Fed. Reg. 29548 (May 30, 1997); 49 CFR 26.5 (1999). "Juvalu," however, does not exist and never has. The drafters undoubtedly meant "Tuvalu," 57 Fed. Reg. 58288 (Dec. 9, 1992), which has become renowned in recent months by selling rights to the use of its internet domain name suffix ".tv." It is telling that in all the regulatory mutations since this Court's 1995 ruling in this case and despite the recent press, DOT has never corrected this sizable error.

[8] The burden of proof, furthermore, remains on the non-preferred races regardless of the stage of the certification process. Members of non-preferred races bear the burden of

On the other hand, persons "not presumed to be socially and economically disadvantaged," meaning men of non-preferred races, must prove their disadvantage. "In such a proceeding the applicant firm has the burden of demonstrating . . . by a preponderance of the evidence" that its owners at least tried to enter the highway construction business in America but were somehow stymied by racial prejudice against them. 49 CFR §§ 26.63(b)(1), 26.67(d) and App. E (2000). More specifically, when the applicants are not men of a preferred race, the certifying entity "must require that applicants provide," "in every case," proof of "one objective distinguishing feature . . . such as race." 49 CFR § 26.67(d) (2000). They must also provide proof of "education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world" because of that racial characteristic. 49 CFR Part 26, App. E.

3. DBE Participation Goal Setting

TEA-21 sets a clear goal of ten percent by value for participation by DBEs in DOT contracting, direct procurement included, but authorizes the Secretary of DOT to revise this goal upward or downward. Pub L. 105-178, § 1101(b)(1), Pet. App. 300. Current law mandates that while recipients of DOT financial assistance must have regional DBE participation goals, 64 Fed. Reg. 5096, 5109 (Feb. 2, 1999), for DOT direct procurement purposes the goals are set on a contract-by-contract basis, 48 CFR

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proof in asserting their own disadvantage, 49 CFR § 26.61, and to the extent they may challenge such status at all, *see* 49 CFR § 26.87, members of non-preferred races also bear the burden of proof in challenging the disadvantaged status of another firm. Realistically, small family owned businesses cannot devote the necessary resources to such a challenge, especially since the necessary information is in the hands of other parties, like DOT.

§ 19.7. Specifically, SBA § 8(d) and the applicable Federal Acquisition Regulations ("FAR") mandate that prime contractors bidding on DOT direct procurement projects, with certain exceptions, must submit "an acceptable subcontracting plan," or else "be ineligible for award" of the prime contract. 15 USC § 637(d)(4)(B); 48 CFR § 19.702(a)(1). The required subcontracting plan "must include separate percentage goals for using . . . small disadvantaged businesses . . . as subcontractors." 15 USC § 637(d)(6); 48 CFR § 19.704(a). The DOT contracting officer in charge of letting the contract then "must review the subcontracting plan for adequacy, ensuring that the required . . . goals . . . are included" and are sufficiently high. 48 CFR § 19.705-4; 15 USC § 637(d)(4)(D). The primary criterion for assessing the sufficiency of the goals is that they must manifest the "maximum practicable" use of DBE subcontractors. 15 USC § 637(d)(4)(D). It cannot be discerned from the statutes or regulations what percentage of subcontract value would represent the "maximum practicable use" of DBEs on any given contract.

4. DBE Participation Goal Achievement

There are two means of achieving DBE goals in direct DOT procurement: coercion and incentive. The coercive means, or stick, is mandatory: an accepted DBE subcontracting plan must be rendered "a material part of the contract" and if the "contractor fails to make a good faith effort" to achieve the plan, then "liquidated damages shall be paid by the contractor" in an amount equal to the shortfall. 15 USC §§ 637(d)(4)(F), (d)(8); 48 CFR §§ 19.705-5(a)(5), 19.705-7, 19.707(b)(2) (2000). There are three incentives, or carrots: "price evaluation adjustments," "evaluation factors" and "monetary subcontracting incentive clauses." 15 USC § 637(d)(4)(E); 48 CFR § 19.201. A price evaluation adjustment artificially inflates the bid prices of all bids other than those by DBEs so that DBEs' bids are more likely to be lowest. 48 CFR Subpart 19.11 (2000). An evaluation factor adds extra

points to the bid evaluation score for a prime contract bid. The number of extra points awarded is proportionate to the size of the included DBE subcontracting goals, so that prime contract bidders enhance their chances of winning by pledging to hire more DBEs than their competitors. 48 CFR § 19.1202 (2000). Monetary subcontracting incentives provide for bonus payments to prime contractors that hire DBE subcontractors.[9] 48 CFR § 19.1203 (2000). A monetary subcontracting incentive gave rise to this case. Pet. App. 207-08; Defendants' Answers to Plaintiffs Second Set Of Interrogatories 2, Feb. 7, 1991. All three incentives are only permissible in states where the United States Department of Commerce ("DOC") determines that minority contractors are underutilized in highway construction. 48 CFR § 19.201(b). Pursuant to DOC's most recent determinations, incentives may be used to increase DBE participation in highway construction only in Alabama, Mississippi, Louisiana, Arkansas, Kentucky, Tennessee, Texas, and Oklahoma. 64 Fed. Reg. 52806 (Sept. 30, 1999); 63 Fed. Reg. 54161 (Oct. 8, 1998). Consequently, only the coercive means of achieving DBE participation is available for direct procurement contracts in other states, such as Colorado, Adarand's area of operations.

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[9] The DOT contracting officer "may encourage increased subcontracting opportunities" for DBEs by placing a clause in the contract "substantially the same as the following":

> If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized, NAICS Industry Subsectors, it will receive ___ [*Contracting Officer to insert the appropriate number between 0 and 10*] percent of the dollars in excess of the monetary target. . . .

48 CFR §§ 19.1203, 19.1204, 52.219-26 (1999).

D. Misconceptions

Before analyzing whether this statutory regime survives proper strict scrutiny, it is necessary to dispel two misconceptions that have plagued this case for years. First, it must be understood that Adarand's challenge is not limited to the use of the DBE hiring bonus. DOT has repeatedly invited the courts to limit the scope of this case to the monetary subcontracting incentive in the West Dolores contract, called the "subcontractor compensation clause" or "SCC." *E.g.*, Brief In Opposition to Petition for *Certiorari* ("Opp.") 4. The Tenth Circuit accepted DOT's invitation. Pet. App. 3. In reality, however, Adarand's first Complaint and its Amended Complaint both sought "a judgment that [the challenged statutes], the regulations promulgated thereunder *and* the contract provisions" are unconstitutional. Reply App. 4-9 (emphasis added). Guided by this Court's instructions on remand, the District Court below found that Adarand had challenged the applicable statutes and regulations as well as the SCC in the West Dolores contract. Pet. App. 160-61. According to this Court's April 13, 2001 order in this case, moreover, the issue presented is the constitutionality of "[DOT's] current Disadvantaged Business Enterprise program," not the constitutionality of the putative "SCC program." Thus, because Adarand seeks prospective relief, the scope of this case includes all of the statutory definitional underpinnings, goal setting, and goal achievement mechanisms that gave rise to the terms of the West Dolores contract and thereby caused Adarand harm. Appropriate taxonomy is crucial for proper implementation of this Court's decision in this case.

Next, it must be acknowledged that DOT has two different DBE programs and that the panel analyzed the workings of the wrong one. This Court's April 13 order requires the parties to address DOT's DBE "program," singular. In reality, however, DOT has one DBE program for federal financial assistance to state and local agencies, and another, separate DBE program for federal highway

contracts let directly by DOT. As this Court found in 1995, this case involves only the latter. The West Dolores contract was one of 14 prime contracts in Colorado that the CFLHD awarded directly to prime contractors between 1983 and 1990. Pet. App. 203, 211. In this case, the necessary definitions and certification procedures for both programs are found in 49 CFR Part 26. Other than the provisions that define basic terms and provide procedures for DBE certification, however, 49 CFR Part 26 is inapposite.[10] Nevertheless, both the panel and DOT have relied extensively on inapplicable provisions of Part 26. For example, in its narrow tailoring analysis the panel quoted 49 CFR § 26.51 for the rule that prime contractors hired by recipients of DOT financial assistance must meet the maximum feasible portion of their DBE goal through race-neutral means. Pet. App. 59. There is no such recipient in this case. Proper strict scrutiny must therefore be

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[10] Only the definitional and certification provisions of 49 CFR Part 26 apply in this case because Part 26 "affects only the airport, transit and highway financial assistance programs of the [US Transportation] Department," 62 Fed. Reg. 29548, 29549 (May 30, 1997), and no such financial assistance is involved here. The first goal of Part 26, by its own terms, is "[t]o ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit and airport financial assistance programs." § 26.1(a) (2000). In a section entitled "To whom does this part apply?," Part 26 plainly states, "if you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract." 49 CFR § 26.3(d) (2000). Instead, Part 26 only "concerns the state and local, rather than the federal, procurement actions." 62 Fed. Reg. at 29549. Since this case concerns federal procurement, not financial assistance, the applicable components of Part 26 are § 26.5 of Subpart A, all of Subpart D (§§ 26.61-73), sections 26.83 to 26.91 of Subpart E, § 26.107 of Subpart F, and all of Appendix E. The inapposite components are sections 26.7 to 26.15 of Subpart A, all of Subparts B and C (§§ 26.21-55), § 26.81 of Subpart E, and all of Appendices A, C, and D (there being no Appendix B).

based on the goal setting and achievement provisions of 48 CFR Part 19, not 49 CFR Part 26.[11]

SUMMARY OF THE ARGUMENT

In the two decades since this Court again held in *Fullilove v. Klutznick*, 448 US 448 (1980), that racial preferences are constitutional under certain circumstances, racial preferences have taken on the very attributes this Court dreaded most. Therefore, at least for government contracting, this Court should return to the ideal expressed in dissent in *Plessy v. Ferguson*, 163 US 537 (1896), that racial preferences, in any direction and under any circumstances, are intolerable, always.

Even if this Court once again holds that racially discriminatory laws are permissible under some circumstances, this Court must find that those circumstances are not present in this case. As an initial matter, the panel misapplied the strict scrutiny test by violating basic rules of evidence and procedure. By accepting Appendix A as competent evidence, moreover, the panel misapplied the compelling interest test. First, to justify the DBE program, DOT must produce a strong basis in evidence that racial discrimination, as opposed to some other consideration, caused disparity in minority participation in highway contracting. The panel failed to investigate causation. Then the panel failed to consider whether Congress had

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[11] 48 CFR Part 19—the FAR—establishes "the respective roles of the executive agencies [like DOT] and Small Business Administration" in implementing federal direct procurement programs, including goal setting. 48 CFR § 19.000(a)(2) (2000). The FAR "implements the acquisition-related sections of the Small Business Act." 48 CFR § 19.000(a) (2000). This Court recognized that the FAR applies in this case when it noted that the SCC itself originated in 48 CFR Part 19, not 49 CFR Part 26. Pet. App. 205 ("the [SBA] program confers a wide range of benefits on participating businesses, see, *e.g.*, . . . 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions").

the necessary evidence *before* it enacted TEA-21. That evidence should have included, for example, a demonstration of the existence of racial discrimination in highway construction contracting in at least a majority of states. By the federal government's own reckoning, however, in 42 out of 50 states there is not even a disparity in minority participation. Also by the government's own reckoning, the information required to form a strong basis in evidence is still not available because Congress and DOT have not yet collected it.

The panel misapplied the narrow tailoring test by finding that a mandatory presumption of disadvantage is not overinclusive. It also misapplied the test by finding that a racially discriminatory highway construction contracting program was a sufficiently focused, last resort solution for, *e.g.*, discrimination in union membership or difficulties in capital access. Finally, the panel misapplied the test by finding that this decades-old, still-expanding DBE program is of appropriately limited duration. If Appendix A is a sufficient basis for the program, then the program could go on forever.

ARGUMENT

I. This Court Should Adopt The Harlan Doctrine And Hold That There Can Never Be A Compelling Interest In Preferential Treatment Of Racial Groups In Government Contracting.

When defeated survivors of the Civil War still ruled the South, this Court held in *Plessy v. Ferguson* that it was permissible under certain circumstances for government to discriminate on the basis of race. 163 US 537 (1896). Justice Harlan saw farther. In dissent, he declared:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man,

> and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Id. at 559. Later, in the heat and confusion of World War II, this Court again pronounced that under certain circumstances it is permissible for the American government to discriminate on the basis of race. *Korematsu v. United States*, 323 US 214, 216 (1944). Ten years later, at the dawn of the civil rights movement, this Court finally recognized that Justice Harlan was correct in so far as *Plessy v. Ferguson* was wrongly decided, but the Court stopped short of holding all racial discrimination by government unconstitutional. *Brown v. Board of Educ.*, 347 US 483 (1954).

When the Court thus left the door open, legislatures all over the country barged through it. Legislatures large and small, including the United States Congress, continued to attempt to generate the necessary circumstances under which they could constitutionally discriminate against certain races.[12] In the attempt, they trampled the

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[12] For purposes of this argument, Adarand will not distinguish among categorization by race, ethnicity, linguistic heritage, geographic origin, and direct familial lineage (blood group). For the sake of simplicity, Adarand herein refers to all such categorizations as "racial." *Cf. Concrete Works v. City and County of Denver*, 86 F.Supp.2d 1042, 1069 (D. Colo. 2000) ("One group is defined by race, another by culture, another by country of origin, and other by blood. . . . The aggregation of them as equally victimized by discrimination and equally entitled to preferential remedies is particularly problematic") (*appeal stayed* pending resolution of this case); *Rice v. Cayetano*, 528 US 495, 120 S.Ct. 1044, 1061 (2000) (Breyer, J., with Souter, J., concurring)

constitutional rights of countless innocent individuals. As this Court feared, after fifty years of such attempts, "there is simply no way of determining what classifications are . . . 'remedial' and what classifications are in fact motivated by . . . simple racial politics."[13] 488 US at 493. The dream of a society where race is irrelevant has become "lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs"[14] committed by persons other than those who suffer in

("to define . . . membership [in a preferred blood group] in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members . . . goes well beyond any reasonable limit").

[13] Racial politics are glaringly evident in the debates regarding whether to again perpetuate the DBE program by passing the discriminatory provisions of TEA-21. Rep. Schuster, Chairperson of the House Committee on Transportation and Infrastructure and sponsor of the bill, candidly admitted that he supported perpetuation of the DBE program only because he "made an agreement to oppose any DBE reforms in exchange for a balanced bipartisan bill that provides maximum funding. . . . " 144 Cong. Rec. H2000-H2011, H2001 (April 1, 1998). Senator Chaffee, Chair of the Senate Public Works Comm., pointed out that President Clinton had promised to veto the bill if it contained no DBE program, but that "[every] single Senator in this place" wanted his or her district's share of the $150 billion dollars TEA-21 provided. 144 Cong. Rec. S1395-S1434, S1411 (March 5, 1998). Representatives Norton and Bonior threatened that "hundreds of thousands" of women and minorities would not reelect anyone who voted to end the DBE program. H2003-04. Reps. Tausher and Poshard and Senators Warner and Kennedy all fretted that the program is already in place, employs many minorities, and would result in economic loss to those people if it ended. H2002; S1401, 1409.

[14] For example, the President of the National Association of Black Manufacturers testified, "[t]he only true claim to being socially and economically disadvantaged . . . excludes all but Black Americans . . . and the Native Americans," *Testimony Before The House Comm. on Small Businesses, Subcomm. on Gen. Oversight and Minority Enter. Task Force on Minority Enter.*, 96th

penance. *Id.* at 505-06. Not even all those entitled to benefit from racial preferences believe they are sound public policy. Instead, they "stigmatize [their] recipient groups," *see United Jewish Organizations v. Carey*, 430 US 144, 173-74 (1977) (Brennan, J., concurring in part), and erode individuals' ability to be judged on their individual talents and contributions alone, *see Goode v. City of Austin*, 202 F.3d 265 (5th Cir. 1999) (table), *cert. denied*, 120 S.Ct. 1996 (2000) (African-American entrepreneur sued food service corporation after his refusal to register as a DBE caused corporation to terminate his vendor contract; standing denied).

Thus, despite fifty years of carefully contrived, deliberate, governmental discrimination, this Court has never allowed any such scheme to pass constitutional muster. This result is to be expected. After all, the Court in *Korematsu* seemingly envisioned that only the most dire of needs, such as "the prevention of espionage and sabotage" in time of global war, could form a compelling interest in racial discrimination by government. Nevertheless, a century after Justice Harlan first proposed the doctrine that all races must always be equal under the law, this Court again declared, in this very case, that there might, someday, be a sufficiently compelling interest to justify racial discrimination in government contracting. Pet. App. 242. It is now time to end this experiment, however well intended it may have been. This Court should adopt the Harlan Doctrine as law, at least as to government contracting.

The Harlan Doctrine should apply in government contracting, at least, because the only possible justification for racial preferences in contracting is unavailable.

Cong. 21 (1979). Norman Mineta, however, Respondent in this case and, at the time, one of California's Representatives in Congress, proposed an amendment extending the presumption to Asians—a large voting block in that state. 125 Cong. Rec. 12082 (1979).

The only possible justification for deliberate governmental racial discrimination in contracting is that racial preferences are required as a last resort effort to "remedy private discrimination," *City of Richmond v. Croson*, 488 US 469, 509 (1989). No other justification, such as pursuit of cultural diversity, will suffice. There can be no reason a person's heritage could be expected to enhance the installation of a guardrail, for example. The "last resort" justification is unavailable in contracting because even in the absence of racial preferences, a low bidder will always have a remedy for discrimination: a lawsuit. If a subcontractor submitted the low bid but did not win, remedy for suspected discrimination is to be found in laws that prohibit discrimination, not in preordained discrimination against innocents. Prophylactic devices for protection against discriminatory selection of bidders could include broadcasting all contracting opportunities. Means of exposing potential discriminators might include mandatory post-award publication of all bids received.

In practice, the Harlan Doctrine means that the government has the solemn obligation to prohibit race discrimination, and the discretion, toward that end, to invoke prophylactic devices that themselves are not discriminatory. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 US 62, 120 S.Ct. 631, 648 (2000) (Congress may enact "reasonably prophylactic legislation."). The Doctrine also means, however, that not even Congress has the power to compel race discrimination by American citizens.[15] The Harlan

[15] Section 5 of the 14th Amendment provides special dispensation for Congress to pass laws that would otherwise violate the 10th and 11th Amendments, but provides no special dispensation for Congress to violate the equal protection component of the 5th Amendment or the Equal Protection Clause of the 14th Amendment. *See United States v. Morrison*, 529 US 598, 120 S.Ct. 1740, 1755 (2000) ("limitations on the manner in which Congress may attack discriminatory conduct" under § 5 of the 14th Amendment "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government"). Section 5 allows Congress to *prohibit* actions by states that would otherwise be constitutional; it does not allow Congress to *mandate* activities that would otherwise be *un*constitutional. *See Morrison*, 120 S.Ct. at 1759. There is no authority whatsoever for the contrary proposition. Although this Court cited *United States v. Paradise*, 480 US 149, 167 (1987) for the proposition that "every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy," Pet. App. 242, that remedy was not devised by Congress legislating generally and without factual predicate. Quite on the contrary, the remedy in *Paradise* was devised by a federal court and imposed upon a single organization on the basis of highly detailed factual findings.

Doctrine recognizes that it is simply impossible to engineer a "society where race is irrelevant to personal opportunity" by deliberately injecting race into decision making and firmly ensconcing racist stereotypes in the law. *See* 488 US at 505.

II. The Panel Misapplied The Compelling Interest Test By Finding That DOT Had Met Its Burden Of Production Of A "Strong Basis In Evidence" That Race Discrimination Caused Racial Disparity In Highway Construction In At Least A Majority Of States.

This case comes before this Court for the third time on cross motions for summary judgment. Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. Pro. 56. As this Court decided in this very case, moreover, "the government bears the burden of proving that the DBE program is constitutional." *In re Sherbrooke Sodding Co.*, 17 F.Supp.2d 1026, 1033 (D. Minn. 1998) (*citing*: *Adarand*, 515 US at 223; *United States v. Virginia*, 518 US at 533).[16] As evidence,

[16] Even if the burden of proof rests with Adarand, this analysis remains the same. Likewise, this analysis would not

Respondents submitted only Appendix A, and the panel relied on it exclusively. Specifically, the panel took "judicial notice of the content of hearings and testimony before the congressional committees and subcommittees cited by the government" such that "the disparity studies were . . . introduced into evidence . . . via [Appendix A]."[17] Pet. App. 33-34 & n.12, 47 n.14, 54. The panel refused to uphold summary judgment for Adarand because, in the panel's view, by producing Appendix A Respondents had presented a sufficiently strong basis in evidence of the necessary facts, but Adarand had failed to

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change if this case concerned DOT state and local financial assistance instead of direct procurement. Regardless of who has the ultimate burden of persuasion, and no matter who let the West Dolores contract, it is clear that DOT bears the burden of producing a strong basis in evidence. *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 969 (2000). DOT cannot meet that burden.

[17] It is obvious that the panel relied exclusively on the text of Appendix A, not the studies Appendix A purports to summarize. To illustrate, the panel quotes Appendix A for the allegation that minority subcontracting firms "still receive only 87 cents for every dollar they would be expected to receive." Pet. App. 45. Published in 1996, Appendix A itself relied for that proposition on a study by the Urban Institute that was not yet finished. 61 Fed. Reg. 26061 n.128 ("To date, UI has evaluated 56 [state and local disparity] studies"). UI completed and most recently published that study in December 1997, well over two and half years before the panel decided this case. Enchautegui, Maria E. *et al., Do Minority Owned Businesses Get a Fair Share of Government Contracts?* The Urban Institute (www.urban.org/authors/enchautegui.html). When finished, UI had evaluated nearly double the number of studies indicated in Appendix A and had concluded that there was no statistically significant underutilization of minority construction subcontractors in the aggregate. *Id.* at 15 and n.6. Further, the UI report plainly states that whatever disparities it did detect "do not necessarily translate into proof of discrimination on the part of state and local governments." *Id.* at xiv.

produce sufficient countervailing evidence to create a genuine issue for trial. Pet. App. 53.

As an initial matter, the panel misapplied the strict scrutiny test by accepting Appendix A as evidence sufficient for summary judgment purposes. Appendix A is not sworn testimony given from personal knowledge.[18] The panel also misapplied the strict scrutiny test by taking judicial notice of Appendix A. To do so was tantamount to "blind judicial deference to legislative or executive pronouncements of necessity," which this Court unequivocally found "has no place in equal protection analysis."[19] *Croson*, 488 US at 500-501. Even if Appendix A

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[18] Pursuant to Federal Rule of Civil Procedure Rule 56(c) and (e), summary judgment evidence must be in the form of admissions, depositions, answers to interrogatories, affidavits, or other sworn testimony. *Celotex v. Catrett*, 477 US 317, 324 (1986). Appendix A is not. Competent summary judgment evidence also "shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence. . . . " Fed. R. Civ. P. 56(e). Appendix A was prepared by Respondents' attorneys in direct response to this case, but not from their personal knowledge, and is composed of hearsay used for the truth of the matter asserted, which therefore would be inadmissible. Fed. R. Evid. 802, 805; *F. Buddie Contracting, Ltd. v. Cuyahoga Community College Dist.*, 31 F.Supp. 571, 582 (N.D. Ohio 1998) (granting summary judgment striking minority preference challenge in part because "the studies [were] not authenticated by anyone with personal knowledge and, thus, [were] inadmissible hearsay").

[19] Judicial notice of the content of Appendix A runs afoul of Federal Rule of Evidence 201. That rule forbids judicial notice of adjudicative facts that are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Appendix A is comprised of adjudicative facts that are obviously incapable of such ready determination. *Qualley v. Clo-Tex Intern., Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (to qualify as legislative fact, instead of adjudicative facts, the facts must be "wholly unrelated to the activities of the parties"); *United States v. Wolny*, 133 F.3d 758,

were cognizable, probative evidence, moreover, the panel misapplied the strict scrutiny test by finding that Appendix A comprised the requisite "strong basis in evidence" sufficient to support a compelling interest.

It is beyond dispute that the use of a racial classification by a governmental actor must be supported by a "strong basis in evidence" of a compelling governmental interest in remedying particularized discrimination in which that government somehow participated. Pet. App. 224; *Croson*, 488 US at 500. Given that the asserted compelling interest is always "remedying past or present discrimination," however, "the true test of an affirmative

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764 (10th Cir. 1998) (adjudicative facts do not "apply universally," but rather, "change from case to case"); *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (adjudicative facts concern "who did what, where, when, how and with what motive or intent"). *See, e.g., Assoc'd Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (litigation regarding validity of allegations like those contained in Appendix A); *Webster v. Fulton County*, 51 F.Supp.2d 1359 (N.D. Ga. 2000), *aff'd*, 218 F.2d 1276 (11th Cir. 2000) (same); *Engineering Contractors of S. Fla. v. Metropolitan Dade County*, 943 F.Supp. 895 (S.D. Fla. 1996), 122 F.3d 895 (11th Cir. 1997) (same); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 893 F.Supp. 438 (E.D. Pa 1995), 91 F.3d 586 (3rd Cir. 1996) (same); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (same). Even if Appendix A contained legislative facts, judicial notice of them was an abuse of discretion requiring reversal. *See Multnomah Legal Services Workers Union v. Legal Services Corp.*, 936 F.2d 1547, 1555 (9th Cir. 1991) (reversing for abuse of discretion when district court "took judicial notice of several post-enactment Congressional statements, including Senate Appropriations Committee reports"); *Cf. Koohi v. United States*, 976 F.2d 1328, 1330 n.1 (9th Cir. 1992) (taking judicial notice of "the basic events surrounding the Iran-Iraq conflict . . . to the extent that they are . . . beyond reasonable dispute" but declining to take judicial notice of the content of "former Secretary of Defense Casper Weinberger's *A Report to the Congress on Security Arrangements in the Persian Gulf* (June 15, 1987)").

action program is . . . the adequacy of the evidence of discrimination offered to show that interest." *Engineering Contractors*, 122 F.3d at 906.

In this case, relying exclusively on the content of Appendix A, the panel concluded the following findings comprise the requisite strong basis in evidence:[20]

- The tendency of company owners to pass ownership of their companies to members of their families instead of members of minority groups, Pet. App. 34-35;
- The difficulty people with no experience have in joining a union in order to gain the experience needed to compete with established non-minority companies, Pet. App. 35;
- The difficulty of obtaining access to capital in the absence of a credit history or collateral, Pet. App. 35;
- The tendency of prime contractors to work with subcontractors they already trust because they have worked with those subcontractors before, Pet. App. 39-40;
- "Bid shopping," a practice by which prime contractors allow trusted former subcontractors to see and beat any lower bid from new, untested firms trying to replace those former subcontractors, Pet. App. 40;

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[20] Likewise, the district court in this case found that the problems Congress was trying to remedy were:

> [D]eficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with the bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

965 F.Supp. at 1576. But then, the district court granted summary judgment to Adarand.

- The inability of new enterprises to obtain bonding because they lack experience, which in turn hinders their ability to gain experience, Pet. App. 41-43; and
- The inability of new market entrants to receive special pricing arrangements from suppliers from whom they have never purchased anything before, Pet. App. 43-44.

In reality, a legally adequate strong basis in evidence must consist of much more. A true strong basis in evidence must be based on logically and mathematically sound means of detecting whether deliberate discrimination caused any observed racial disparity in highway construction contracting. By relying exclusively on Appendix A, the panel precluded itself from performing such inquiries. A true strong basis in evidence for this national DBE program also requires statistical evidence that racial discrimination caused nationwide underutilization of minority contractors. Here, by the federal government's own reckoning, minority highway contractors are not even underutilized in all but eight states and the requisite evidence still does not exist. Finally, it is necessary that Congress had the requisite strong basis in evidence *before* it enacted TEA-21, but Congress, to the extent it made any findings at all, demonstrated impermissible motive and lack of evidence.

A. A Strong Basis In Evidence Must Demonstrate That Race Discrimination Caused Any Observed Racial Disparity In Highway Construction, But The Panel Failed To Investigate Causation.

Although *Croson* teaches that a "gross statistical disparity," if properly derived, can raise an inference of racial discrimination under certain circumstances, indications of disparity alone, however large, cannot suffice as a strong basis in evidence. 488 US at 501. Accordingly, "[i]t is permissible to remedy *discrimination*[; i]t is not

permissible to remedy a *disparity*. . . . " *Middleton v. City of Flint, Michigan*, 92 F.3d 396, 406 (6th Cir. 1996) (italics in original). Moreover, as the panel below correctly recognized, anecdotal evidence of discrimination may be considered only after a determination that the necessary statistical evidence of deliberate discrimination exists. Pet. App. 29. Therefore, in order to conclude that there is strong evidence of a compelling interest, a court must find proper statistical evidence of "deliberate patterns of racial exclusion."[21] *Croson*, 488 US at 492, 500. To be eligible for consideration as a strong basis in evidence, statistical evidence must meet four criteria. The panel misapplied the compelling interest test by failing to inquire whether Appendix A, to the extent it constitutes statistical evidence at all, meets any of them. It does not.

First, statistical evidence must be derived from the proper sample pool. That pool consists of those contractors who not only have the necessary expertise to perform the contracts in question, but who also have met any necessary preconditions -such as bonding requirements and capitalization, and who are not otherwise engaged at the time. *Croson*, 488 US 501-02. This Court called such

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[21] A court must also find evidence that the government participated, at least passively, in any deliberate patterns of racial exclusion it professes to have detected. *Croson*, 488 US at 492, 500. In this case, the panel misapplied the compelling interest test by failing even to look for such evidence. For example, the panel stated that "subcontractors' unions place before minority firms a plethora of barriers to membership," Pet. App. 35, but the panel failed to indicate how government was involved with that discrimination. Such involvement might include, for example, some federal requirement that federal prime contractors may only engage subcontractors who belong to subcontractors' unions. The panel, however, sought no such requirement. Instead, the panel simply decreed, without more, that government passively participates in the alleged discrimination by such unions. That decree is an obvious non-sequitur.

contractors "qualified," "willing and able." *Id.* In the absence of statistical evidence derived from the proper pool, this Court found, any finding of racial animus would rest on only "the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population." *Id.* at 741. In this case, the panel did not even ask whether the statistics it cited from Appendix A were derived from the proper pool of qualified, willing and able contractors.

Second, statistical evidence must contain detailed explanation of the methods by which it was derived. "[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989). Here, the panel merely parroted conclusions without inquiring into methods. For example, the panel recited the statement in Appendix A that "minority firms were nearly twice as likely to be rejected for bonding . . . than white firms with the same experience level," Pet. App. 43, but the panel moved on without noticing that Appendix A contains no discussion whatsoever of how that conclusion had been reached, 64 Fed. Reg. at 26060 & n.199.

Third, "in order for statistical evidence to create an inference of discrimination, the statistics must show a significant disparity and eliminate nondiscriminatory explanations for the disparity . . . [;] . . . statistical evidence *must* focus on *eliminating nondiscriminatory explanations* for disparate treatment between *comparable* individuals." *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (italics in original). *Accord, Wessmann v. Gittens*, 160 F.3d 790, 804 (1st Cir. 1998); *Koger v. Reno*, 98 F.3d 631, 637 (D.C. Cir. 1996). "*Croson* . . . reaffirmed the Court's longstanding teaching that we must staunchly resist attempts to substitute speculation and correlation for evidence of causation." *Wessmann*, 160 F.3d at 804; *accord, Drabik*, 214 F.3d at 736; *Walker*, 169 F.3d at 985 n.33. Therefore, this Court held, "[t]o draw an inference of

discrimination from statistical disparities, while all 'measurable variables' need not be accounted for, all 'major variables,' must be controlled and accounted for." *Bazemore v. Friday*, 478 US 385, 400 (1986). "[T]he requirement of considering various salient causal factors is part and parcel of [the government's] duty to limn a plausible causal relationship between particular independent and dependent variables." *Wessmann*, 160 F.3d at 834 n.8 (internal citations omitted). One court observed, in fact, that this Court "unanimously held . . . that a regression analysis that does not control for at least major variables may be altogether inadmissible." *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 681 (4th Cir. 1996), *citing Bazemore*, 478 US at 400 & n.10. The panel's most glaring failure in this case was that it made no attempt whatsoever to investigate whether the statistical conclusions it relied on employed judicially acceptable means of accounting for causation, such as proper regression analysis. In thirteen citations of "evidence" that race discrimination caused disparate access to capital, for example, the panel bothered to note whether "all other factors were equal" in only three, and never investigated whether those factors were, indeed, equal. Pet. App. 37-38 (Grown & Bates report, Ando article, CCCD survey).[22] Likewise, the panel made absolutely no effort to ensure that the studies' authors had actually considered some of the relevant major contributory factors, let alone all of them. *Id.*

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[22] The other ten bits of "evidence" on which the panel relied consisted solely of parroting the conclusory statements of self-interested parties made before Congress. Pet. App. 35-38. Lending credence to such statements contravenes this Court's admonition in *Croson* that "highly conclusionary statement[s] of proponent[s] of the Plan that there was racial discrimination in the construction industry . . . are of little probative value in establishing identified discrimination." 488 US 469, 500; *infra*, n.24.

Fourth, the statistics must be collected separately for prime contracts and subcontracts. Since Respondents do not assert that DOT itself is engaged in deliberate discrimination, the basis of DOT's direct procurement DBE program must be passive participation. Unless subcontracting statistics are collected separately, however, it is logically impossible to discern whether government passively participates in discrimination because minority representation in subcontracts could make up for any observed disparity in prime contracts. *W.H. Scott Constr. Co., Inc. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999). Ordered by Congress to assess the status of DBE participation in DOT contracting (*see infra*, pp.36-37), the United States General Accounting Office ("GAO") reported that "both the number and value of subcontracts awarded to DBEs and non-DBEs" is "information necessary to calculate DBEs' participation rates in subcontracts." GAO, *Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information Is Needed To Understand Program Impact* 21, June 2001. The panel utterly failed to make this inquiry. GAO, moreover, concluded that no such inquiry is even possible. "Because DBEs are . . . more likely to compete for subcontracts . . . than prime contracts, the lack of subcontracting data prevents anyone from gaining a complete understanding of DBEs' participation in transportation contracting." *Id.* at 21-22.

The panel's failure to investigate whether Appendix A met these four criteria is obvious. To illustrate, Respondents and the panel both relied heavily on Brimmer & Marshall's study of disparities in Atlanta. Pet. App. 43; Resp. 22. Long before they cited that study as "particularly striking" evidence of deliberate discrimination, however, the study had been thoroughly discredited. For example, it contained "no statistical analysis of other factors that may affect minority business enterprise availability and utilization." *Webster*, 51 F.Supp.2d at 1357, 1368-70. In other words, it did not account for causation. The Eleventh Circuit therefore affirmed the district

court's holding that, afflicted with such "insurmountable" flaws, "the Brimmer-Marshall Study fails to provide a strong basis in evidence of discrimination against [D]BEs to justify [a] racial and ethnic preference program." 218 F.3d at 1267.

B. A Strong Basis In Evidence For This Nationwide DBE Program Requires Strong Evidence Of Deliberate Racial Discrimination In Highway Contracting In At Least A Majority Of States, But By The Federal Government's Own Reckoning, There Is Not Even A Disparity In 42 States.

This Court made clear in this very case that DBE programs must be scrutinized, strictly and with "skepticism," for "congruence" between the alleged compelling interest and the racially discriminatory solution. Pet. App. 226. More recently, in *United States v. Morrison*, this Court made clear that congruence requires a match between the geographic area in which government participation in discrimination is found, and the area in which the race-based solution is applied. 120 S.Ct. at 1759. More specifically, when "Congress' findings indicate that the problem of discrimination . . . does not exist in all States," then the solution cannot apply in all states, either. *Id.* This proposition ought to apply with special force in this case because the federal government itself acknowledges that construction is a regional industry. *See* 64 Fed. Reg. 52806 (Sept. 30, 1999). Thus, Congress has the power to direct a remedy for discrimination—*i.e.*, Congress has a compelling interest—"only [in] those States in which Congress found that there had been discrimination." *Id.*; *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 US 356 (2001); *Kimel*, 528 US 62; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 US 627 (1999); *City of Boerne v. Flores*, 521 US 507 (1997). In this case, however, although the mandatory DBE subcontracting provisions apply nationally, DOT and Congress have affirmative

reason to believe there is no nationwide discrimination against minority highway construction companies. As required by 48 CFR § 19.201, the United States Department of Commerce ("DOC") conducted a "benchmark study" seeking underutilization of minority "Street and Highway Construction" companies (SIC code 16). It found no disparity—let alone evidence of intentional discrimination—in 42 out of 50 states.[23] 63 Fed. Reg. 35714 (June 30, 1998); 63 Fed. Reg. 54161 (Oct. 8, 1998). DOC confirmed that result one year later. 64 Fed. Reg. 52806 (Sept. 30, 1999). Furthermore, DOC found no alleged underutilization in Colorado, where this case arose. GAO was even more explicit. Expressly ordered by Congress to assess DBE participation in DOT contracting, *infra*, pp.36-37, GAO's conclusion was unmistakable: "A lack of key information prevents *anyone* from gaining a clear understanding of the firms that participate in the DBE program and how these firms compare with the rest of the transportation contracting community." App. 6 (emphasis added).

[23] In citing the benchmark study, Adarand in no way accepts that the study's methodology or conclusions are valid. Because the methodology is flawed, in fact, the study probably underestimates minority participation levels. Dr. George La Noue, *To the 'Disadvantaged' Go The Spoils*, 138 The Public Interest, Winter, 2000 at 91-98. Even if the study's conclusions are accurate, though, they cannot possibly be characterized as a strong basis in evidence of a compelling interest in a national DBE program because the benchmark study sought only disparity, and expressly disclaims any attempt to find the requisite intentional discrimination. 63 Fed. Reg. at 35718 n.10.

C. A Strong Basis In Evidence Must Demonstrate That Congress Had Compiled The Requisite Evidence *Before* It Enacted TEA-21, But To The Extent Congress Made Any Findings At All, They Show Impermissible Motive And Lack Of Evidence, And By The Federal Government's Own Reckoning, The Requisite Evidence Still Does Not Exist.

This Court has made clear that "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature." *Shaw v. Hunt*, 517 US 899, 908 n.4 (1996). Instead, "the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification. . . . " *Id.* Therefore, "the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary *before* it embarks on an affirmative-action program." *Id.* at 910 (emphasis in original); *accord*, *Bush v. Vera*, 517 US 952, 982 (1996); *Croson*, 488 US at 504 (requiring that government actors "must identify that discrimination- . . . with some specificity before they may use race-conscious relief").

In this case, Congress certainly did not rely on the Benchmark Study in passing TEA-21. The results of that study were not published until two weeks after the bill was passed. *Infra* nn.1, 23. Instead, Congress' objective, and the evidence upon which Congress relied, may be found in three sources: 1) express statements of purpose in the statute or in Committee reports describing the statute; 2) inferences drawn from the substantive provisions of the statute; or 3) where no other source is available, from floor statements regarding the statute.[24] As to

[24] Seeking another, more favorable source of Congressional findings and intent, the panel attempted to derive a compelling interest from 23 selected quotes from witnesses appearing before 12 different committee hearings. *E.g.*, Pet. App. 36-37.

TEA-21 however, not one of these sources describes a permissible purpose or shows Congress was operating on the basis of strong evidence. On the contrary, the only available indications of congressional intent show that Congress' motive at the time it passed TEA-21 was impermissible.

First, TEA-21 has no preamble and its extensive accompanying committee reports contain no statement of the purpose of its DBE provisions. *See, e.g.*, H. Rep. No. 105-550 (1998), *reprinted in* 1998 USCAAN Leg. Hist. 3, 82. In fact, the committee reports expressly state that Congress abdicated its responsibility of finding evidence of a compelling interest to the courts. *Id.* (TEA-21 "makes no changes to these [DBE] provisions preferring to let the courts resolve these issues"). These facts alone are sufficient reason to find Congress lacked a compelling interest in passing the program. *See Drabik*, 214 F.3d at 735-36 (noting district court's observation that in all the "drafts of bills, Legislative Service Commission summaries, and transcripts of floor debate, there is not one . . . finding of discrimination to be found" and striking statute because this Court held legislatures are entitled to no deference in equal protection analysis, *citing Miller v. Johnson*, 15 US 900, 923 (1995)).

Second, provisions of the statute itself—and their implementation—demonstrate conclusively that Congress did not have the necessary evidence of a compelling interest at the time it passed TEA-21. In fact, Congress still has no such evidence. For the first time in any statute anywhere, Congress in TEA-21 ordered GAO to collect very specific information about DBE participation in DOT highway contracting, including the participation rate of DBEs in DOT prime and subcontracts. Pub. L. 105-178,

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The panel's effort fails, however, because an ordinary hearing will include testimony on both sides of an issue and often heated debate about whom Congress should believe. Thus, only a committee's conclusions, detailed in its report, can assist validly in this inquiry.

§ 1101(b)(6); 112 Stat. 107, 114-15 (1998). Precisely these data were necessary to establish a compelling interest for TEA-21's DBE provisions before enactment. Since the data were not yet gathered, there can have been no compelling interest in 1998. GAO published its conclusions in June 2001, and, by concluding that there is insufficient information to assess the DBE program, proved that the necessary data still do not exist: "it is impossible to define the universe of DBEs, compare them with the transportation contracting community as a whole or gain a clear understanding of the overall impact of the DBE program." App. 58. GAO found the disparity studies it reviewed contained "significant weaknesses" that "create uncertainties about the studies findings." App. 8. Further, "the majority of states and transit authorities . . . had not conducted any type of analysis to identify" non-discriminatory reasons for any detected disparities. *Id.* Finally, GAO concluded that DOT "does not systematically track information on complaints of discrimination," and therefore "could not provide information on the total number of such complaints, the total number of investigations launched, or the outcomes of the investigations." *Id.* Without all of this information, there could be no strong basis in evidence of a compelling interest even if *post hoc* rationalizations could suffice.[25]

Third, floor statements indicate impermissible motive.[26] In fact, some legislators declared that TEA-21

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[25] GAO also found that "federal courts . . . have concluded that the federal DBE program serves a compelling governmental interest," but GAO relied for that assertion on the very decision this Court is reviewing. Further, GAO relied on the same false citation in Appendix A to the UI study that the panel quoted. *Infra*, n.17; App. 40. Such bootstrapping is self-evidently impermissible.

[26] This Court has expressly noted that floor statements are of scant value in equal protection analysis. As this Court stated unequivocally in *Kimel*, for example, "isolated sentences clipped from floor debates and legislative reports" that litigants

would never pass constitutional muster. Senator Sessions, for example, said that the DBE provision in TEA-21 "is not a remedy for specific governmental racial discrimination[;] . . . there has been no determination in this case the federal highway administration is systematically and pervasively biased in its operation." S1400. Even some DBE proponents admitted that TEA-21 would not be constitutional as passed, and relied expressly on regulations not yet written to rectify the problem.[27] Some legislators only made irrelevant observations that such programs do, in fact, increase DBE participation.[28] Other statements reveal that to the extent Congress was not engaged in mere logrolling[29] or ill-conceived efforts at economic development,[30] Congress was playing racial politics,[31] trying to engender "diversity,"[32] or attempting to remedy

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"cobbled together from a decade's worth of congressional reports and floor debates" is wholly insufficient to support their theory of Congressional intent—even under the rational basis test. 120 S.Ct. at 649.

[27] Senators Chaffee, Kerry, Baucus, and Boxer all pointed out that new regulations—not yet written—would narrowly tailor the program, S1412, 1409, 1423, 1433, but such regulations obviously could not retroactively generate a compelling state interest.

[28] *Infra*, n.13 (comments of Reps. Tausher and Poshard and Senators Warner and Kennedy).

[29] To whatever extent they were not engaging in racial politics, the chairmen of the House and Senate transportation committees exemplified the logrolling motive for the DBE program. *Infra*, n.13 (comments of Rep. Schuster and Senator Chaffee).

[30] Reps. Velasquez and Lampson referred to the DBE provisions of TEA-21 as a mere economic development program. H2010. Others recited the numbers of dollars spent and people employed by it. *Id.*; H2006.

[31] *Infra*, n.13 (comments of Reps. Norton and Bonior).

[32] Representative Jackson-Lee explained that DBE programs are a "necessary" attempt "to achieve true multi-

amorphous societal discrimination[33]—all forbidden motives under *Croson*. 488 US at 496; *Hopwood v. State of Texas*, 78 F.3d 932, 945 (5th Cir. 1996) ("there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination[; s]ubsequent Supreme Court caselaw strongly suggests, in fact, that it is not"). Notably absent, moreover, are references by Committees and individual legislators to Appendix A, on which the panel so heavily relied.

III. The Panel Misapplied The Narrow Tailoring Test By Finding That A Mandatory Presumption Is Not Overinclusive, That Race-Based Highway Contracting Was A Last Resort Solution For Difficulties In Capital Access, And That This Still-Expanding, Decades-Old Program Is Of Appropriately Limited Duration.

To survive summary judgment Respondents must demonstrate not only that Congress had a strong basis in evidence of a compelling interest, but also a strong basis in evidence that DOT's direct procurement DBE program is narrowly tailored. *City of Philadelphia*, 91 F.3d at 596. Further, there must be strong evidence of narrow tailoring in all four steps of the program's implementation: the

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cultural and multi-gender diversity amongst those people this government chooses to do business with." Cong. Rec. H2006 (daily ed. April 1, 1998).

[33] Senator Mosely-Braun flatly stated: "[T]he DBE Program is no more and no less than a structural response to a structural distortion of our society that is caused by 200 years of slavery and segregation. . . . It responds to the unfortunate but obvious fact that our society was constructed on the traditional station of women and minorities." S1420. (She did not explain, however, how by this logic Hispanics and Asians would be entitled to the presumption.)

definition of disadvantage, the certification process, the goal setting process, and the goal achievement machinery.[34] These four steps are a dependent sequence, moreover, so it is logically impossible to narrowly tailor the methods of achieving DBE goals unless each of the prior three steps is narrowly tailored, too. The panel misapplied this test; Respondents cannot meet this burden.

First, whereas this Court demands individualized inquiry, TEA-21 affirmatively precludes individualized inquiry. Second, whereas this Court permits highly focused, statutory racial classifications only as a last resort, all available evidence shows Congress and DOT ignored several race-neutral or more focused solutions. Third, this Court permits statutory racial classifications only for as long as the discrimination they are supposed to remedy persists. If Appendix A is sufficiently strong evidence of appropriately limited duration, however, then an end to alleged discrimination in construction still would not terminate the program.

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[34] The panel repeatedly asserted that the DBE program uses "aspirational goals," not quotas, as though the distinction contributes to narrow tailoring. *E.g.*, Pet. App. 65. Current equal protection law rejects the goal/quota distinction, however. *City of Jackson*, 199 F.3d at 215 ("it is irrelevant whether the [challenged racial preference] establishes 'goals' or 'quotas' for DBE participation . . . because '[a]ny one of these techniques induces employers to hire with an eye toward meeting numerical goals[; a]s such, they can and surely will result in individuals being granted a preference because of race"); *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 352-54 (D.C. Cir. 1998) ("we do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals"); *Monterey Mechanical Co. v. Wilson*, 138 F.3d 1270, 1271 (9th Cir. 1998) ("the relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.").

A. DOT Failed To Submit The Requisite Strong Evidence That TEA-21 Even Permits Individualized Inquiry Into Disadvantage, Let Alone Whether The Regulations Actually Provide For It.

This Court established conclusively in *Croson* that narrow tailoring requires "inquiry into whether or not the *particular* [D]BE seeking a racial preference has suffered from the effects of past discrimination" in which government somehow participated. *Croson*, 488 US at 508 (emphasis added). Thus, "a broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Hopwood*, 78 F.3d at 951. In this case, the challenged statute cannot be narrowly tailored because the statute affirmatively prohibits individualized inquiry and cannot be rescued by regulation. Furthermore, even if it were possible to narrowly tailor the mandatory presumptions by imposing contrary regulatory requirements for individualized inquiry, in this case DOT has not done so.

1. TEA-21 On Its Face Precludes The Requisite Strong Evidence Of Individualized Inquiry By Mandating That Disadvantage Be Presumed Instead Of Proven.

The DBE provision of TEA-21 is unconstitutional on its face because it precludes individualized inquiry. TEA-21 clearly requires DOT to "presume" all men of certain races and all women are "disadvantaged." 15 USC § 637(d)(3)(C); *See* Pet. App. 206. "A presumption is an assumption of fact resulting from a rule of law which *requires* such fact to be assumed from another fact or group of facts found or otherwise established. . . . " Uniform Rules of Evidence, Rule 13, *quoted in* 9 *Wigmore on Evidence* § 2493f (5th Ed. 1999) (citing A.L.I. Model Code of Evidence Rule 701(1,2)) (emphasis added). Thus, "if a basic fact ([race]) is established, the fact-finder *must*

accept that the presumed fact ([social and economic disadvantage]) has also been established, unless the presumption is rebutted." 1 *Weinstein's Federal Evidence* § 301.02[1] (2nd Ed. 2000) (emphasis added); *accord, Wigmore* § 2491; 2 *McCormick on Evidence* § 346 (5th Ed. 1999). Accordingly, one cannot simultaneously maintain a presumption while demanding actual evidence of the presumed fact. The presumption of delivery of properly posted mail, for example, affirmatively precludes any demand that the mailing party produce evidence that a letter actually reached its addressee unless and until some other party shows evidence that the letter did not arrive. *See McCormick*, § 343 at 439. Consequently, the mandatory presumption in TEA-21 affirmatively precludes any requirement for evidence of disadvantage. Such evidence of disadvantage would be necessary for truly individualized inquiry, and thus for sufficiently narrow tailoring. Moreover, whereas a statute that fails to require the necessary individualized inquiry may be unconstitutional "as applied," a statute that prohibits such inquiry is unconstitutional "on its face" because "the statute could never be applied in a valid manner." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 797-98 (1984). TEA-21's DBE provisions are facially unconstitutional as a result.

DOT attempts to fix this problem by regulation. It labors in vain, however, because no regulation can so materially contravene a clear statutory directive. DOT attempts to provide for individualized inquiry by requiring "signed, notarized" statements and certifications of disadvantage from each applicant. 49 CFR § 26.67(a). This is surely a requirement for evidence. Fed. R. Civ. Pro. 56(e). "Regulations," however, "in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 US 864, 873 (1977). A requirement for evidence of disadvantage is inconsistent with a requirement that disadvantage be presumed once race or sex is established. Consequently,

DOT's regulatory attempt to provide individualized inquiry in spite of the statutory presumption is void.

2. Even If Regulations Could Provide For Individualized Inquiry Despite The Presumption, DOT's Regulations Do Not: There Is No Real Inquiry, And The Determination Of Identity And Membership Of Racial Groups Entitled To The Presumption Is Irreparably Arbitrary.

In addition to the observation that the regulations are void, DOT's regulatory attempt to provide narrow tailoring fails for at least three reasons. First, as a practical matter, requiring someone to affirm the truth of an otherwise unsupported conclusion is hardly the same as engaging in an actual inquiry. An actual inquiry might include, for example, questions about whether the individual has a college degree, is a recent immigrant, has ever before attempted to go into business of any kind in America, or has ever experienced racism that hindered any such attempt. An actual inquiry might also include a requirement to describe any such experience. The regulations do not allow such questions. By its own terms, in fact, 49 CFR Part 26 distinguishes between the "individual determinations of social and economic disadvantage" required for members of some races, and "the presumption" granted to members of other races. 49 CFR § 26.67(d) (Oct. 1, 2000). Obviously, for those granted the presumption no individual determination is required.

Second, even if the requirement for sworn statements of disadvantage could constitute a sufficiently individualized inquiry, the DBE program is overinclusive because of "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry." *Croson*, 488 US at 506. The random nature of the inclusions is self-evident. Persons from 42 countries enjoy the presumption despite that members of Congress never uttered those countries'

names and despite that rates of successful business formation among persons from some of those groups are at or above the national average. *Concrete Works*, 86 F.Supp.2d at 1070 ("The leading group forming businesses in recent years . . . has been Korean Americans with formation rates almost twice as high as Chinese Americans who were exactly at the national average"). The presumption also includes every single lawfully admitted permanent American resident who happens to be female. 48 CFR § 26.5. Altogether, DOT presumes approximately 65% of the American population is socially disadvantaged, despite that there is not a scintilla of evidence, even in Appendix A, to suggest that Tuvaluvans, for example, have suffered discrimination in the American construction industry. Nor can there be any rational explanation for assuming that persons born on the west bank of the Fly River are socially disadvantaged while those born a few feet away on the opposite bank are not. *See Drabik*, 50 F.Supp.2d 741, 770 (S.D. Ohio 1999), *aff'd*, 214 F.3d 730 ("few things [could be] more repugnant to our constitutional system than . . . the sole criteria for exclusion being the side of a river . . . their ancestors decided to settle"). Nevertheless, as it stands, an Indonesian subcontractor will enjoy the presumption a while Papua New Guinean will have to submit preponderant proof. 49 CFR § 26.5.

Third, even if listing such a random assortment of groups could be narrowly tailored, the provisions for determining membership in such groups are irreparably overbroad. The latest proposed regulations provide that an individual must merely swear or affirm that he is a member of such a group (or that she is female). 66 Fed. Reg. 23208, 23213 (May 8, 2001). Though the certifying official can request further proof if there is "well founded reason" to question the applicant's group membership, there is no indication whatsoever as to what might constitute a "well founded reason." Further, the "proof" the official could request is severely restricted, such that "if a birth certificate is adequate for one group, then only a

single piece of evidence may be required from members of other groups." *Id.* at 23212. That single piece might be "a drivers license or a birth certificate," moreover, but all such evidence would prove is that the applicant (or his parents) has held himself out as a member of some presumptively disadvantaged group at least once before. This weakness in the process is irreparable because there is no workable definition of race. *Concrete Works*, 86 F.Supp.2d at 1069 ("there is no agreed working definition of Hispanic persons since they may be of different races and may have very different cultural, religious and geographic origins"); *infra*, n.12. Since race cannot be defined or associated with any given individual with sufficient precision, the program can never be narrowly tailored.

B. DOT Failed To Submit The Requisite Strong Evidence That Congress Tried Even The Obvious Race Neutral Options Before Enacting TEA-21.

Statutory racial classifications are permissible only in an "extreme case," 488 US at 509, and only when "every constitutional 'i' is dotted and every 't' is crossed," *Engineering Contractors*, 943 F.Supp. 1546, 1556 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997). In other words, a "race conscious remedy will not be narrowly tailored until less sweeping alternatives—particularly race-neutral ones—have been considered *and tried*." *Walker*, 169 F.3d at 985 (emphasis added); *accord, Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997). Like race-conscious remedies, moreover, race-neutral alternatives must be aimed at correcting the effects of deliberate discrimination. A race-neutral measure taken for the sole purpose of achieving some hazy notion of how much participation is "proper" for a given group in a particular line of work is nothing more than "discrimination for its own sake." *Regents of Univ. of Cal. v. Bakke*, 438 US 265, 307 (1978). Accordingly, as this Court held in *Croson*, since the seven barriers the panel identified are race-neutral, Congress' solution to them

must be race-neutral, too, if at all possible. If Congress had "a whole array of race-neutral devices to increase the accessibility of [government] contracting opportunities to small entrepreneurs of all races," 488 US at 510, then Respondents must produce a strong basis in evidence that Congress actually tried such solutions before enacting TEA-21. For example, "[i]f [D]BEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of [federal] financing for small firms would, *a fortiori*, lead to greater minority participation." 488 US at 507. Likewise, given the seven barriers the panel identified, Respondents must produce a strong basis in evidence that Congress tried "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races" before enacting TEA-21. *Id.* at 509-10.

Respondents did not, and cannot, produce such evidence. On the contrary, Appendix A and DOT's own regulations both show that race-neutral solutions were available but not tried. Appendix A laments:

> [m]inorities and women are always left out in any kind of design or planning phase for these projects, and that is why when [they] first know about them * * * it is traditionally too late to get [their] forces and resources together to react.

61 Fed. Reg. at 26060 (*citing* H.R. Rep. No. 870, 103rd Cong., 2nd Sess. 13 (1994)). If so, then race-neutral requirements for open participation in the design stage of DOT projects must be attempted before racially discriminatory contracting practices. There is no evidence of such an attempt. Likewise, Appendix A notes that "[a]ll contractors on federal construction . . . contracts valued at over $100,000 are required to secure a surety bond guaranteeing the performance of the contract," and that minority firms' lack of experience precludes them from obtaining such bonds. *Id.* Therefore, Respondents must produce evidence that Congress tried waiving that bonding requirement for inexperienced firms before requiring

DOT to presume, *e.g.*, that every single Sri Lankan permanently residing in America has tried to enter the American highway construction business. Respondents produced no such evidence. Quite the opposite is true: DOT expressly acknowledged that a low bid system for subcontracting would be a race-neutral means of achieving DBE participation, 64 Fed. Reg. 5096, 5112, but nevertheless rejected this requirement for recipients of DOT financial assistance, *see* 49 CFR § 26.51.

C. Lacking Individualized Inquiry, There Can Be No Appropriate Limit To Duration, And Even If There Could Be, The Evidence In Appendix A Supports None; The DBE Program Is A Safe Harbor For Discrimination, Not A Remedy.

As this Court explained in this very case, Congress must ensure that a statutory racial classification has a finite duration "appropriately limited such that 'it will not last longer than the discriminatory effects it is designed to eliminate.' " 515 US at 237-238. DOT's direct procurement DBE program fails this test for at least three reasons.

First, because the program lacks individualized inquiry, it therefore also lacks limited duration. As Justice Powell wrote in *Wygant v. Jackson Board of Education*, "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." 476 US 267, 276 (1986); *Croson*, 488 US at 498; *Regents of Univ. of Cal. v. Bakke*, 438 US 265, 307 (1978). Since the alleged remedy of TEA-21 precludes such "particularized findings," *Wygant* teaches that it also has no time limit. Certainly, there are no time limits for group entitlements to the presumptions. Large groups (*e.g.*, Asians) cannot be removed. They are mandated by statute. Small groups (*e.g.*, Tuvaluvans) can be added, 49 CFR § 26.7 (2000); 13 CFR § 124.103(d), and group after group has been, *see*,

e.g., 54 Fed. Reg. 12054 (March 23, 1989), but the regulations have no provisions for removing small groups from the presumptions and no group has ever been removed.[35] The program has been growing inexorably since its passage in 1978 as a result.[36] Pub. L. No. 95-507.

Second, if the evidence the panel relied on were sufficient, then the program would remain justified forever. As the requisite strong basis in evidence of a compelling interest in enacting TEA-21, the panel invoked a list of seven "barriers" to minority participation in commerce. *Infra*, part II. In essence, those barriers were limited to two observations: the construction industry is dominated by non-minority family firms that minorities find difficult to inherit; and minority enterprises that wish to compete with these family firms find it difficult to do so because, having neither experience nor collateral, they find it difficult to obtain bonding and capital and to develop strong, enduring relationships with vendors and customers. These factors are precisely the same factors that this Court considered in *Croson* and for which this Court rejected a race-conscious solution. They are nothing but "a host of non-racial factors which would seem to face a member of any racial group attempting to establish a new business enterprise. . . . " 488 US at 498-499. The panel and this Court in *Croson* both enumerated several such race-neutral factors, including "deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record." *Id*. Whereas this Court enumerated these barriers to demonstrate lack of narrow

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[35] Except Laotians, but the removal was inadvertent and the group was reinstated. 54 Fed. Reg. 34717 (Aug. 21, 1989).

[36] The panel noted that DBE certifications expire after three years, Pet. App. at 62 *citing* 13 CFR § 124.1014, but this requirement does not contribute to narrow tailoring because a DBE can then simply apply for recertification. The social presumption never expires, and the economic presumption is an ineffective barrier to perpetual certification. *Infra*, n.4.

tailoring, however, the panel enumerated them in support of a compelling interest. As a result, if the panel was correct in finding a compelling interest on the basis of the seven barriers it recited, then it must have been in error in finding the DBE program narrowly tailored.[37]

Third, because the program allows aggregation of all minorities for purposes of meeting participation goals, it is not well calculated to root out and rectify discrimination and then end. On the contrary, it provides a safe harbor for discrimination. By providing no guidance whatsoever regarding what might constitute the "maximum practicable" use of DBE subcontractors, DOT regulations grant contracting officers great discretion in accepting or rejecting subcontracting plans. That discretion allows prime contractors to propose and meet their DBE participation goals by employing the DBE(s) of their choice. As a result, even if a prime contractor were truly bigoted, he could propose very high DBE goals in order to win prime contracts, then by hiring only Asian- or Hispanic-owned subcontractors, meet those goals while simultaneously maintaining a practice of the most horrid race discrimination imaginable against Black-owned subcontractors. *See Assoc. for Fairness in Bus., Inc. v. State of New Jersey*, 82 F.Supp.2d 353, 362 (D.N.J. 2000) (allowing satisfaction of goals "in a way that would bestow a windfall of remedial benefits on one group while depriving another group of any such benefit" is "clearly not narrowly tailored"). Because DOT's DBE program provides this safe harbor, it cannot possibly be described as narrowly tailored to smoke out and remedy discrimination. *See Croson*, 488 US at 721.

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[37] In addition, though the panel pointed out that TEA-21 itself will eventually expire, Pet. App. at 62-63, this fact cannot contribute to narrow tailoring if the panel's *post hoc* identification of the seven barriers is all that is required for a compelling interest in reenactment of the DBE program. Moreover, section 8(a), from which the presumptions are derived, is a permanent fixture of law.

CONCLUSION

Because Respondents have failed to produce the requisite strong basis in evidence to justify DOT's racially discriminatory practices, this Court must reverse the panel's judgment and remand with instructions to enter summary judgment for Adarand. *See, e.g., City of Jackson*, 199 F.3d 206 (summary judgment for plaintiff challenging racial preference program when government failed to meet burden of production of strong basis in evidence); *City of Philadelphia*, 91 F.3d 586 (same); *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 975 F.2d 762 (11th Cir. 1992) (same); *J. Edinger and Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986) (same); *Kornhass Constr., Inc. v. Oklahoma*, 2001 WL 434387 (W.D. Okla. Feb. 9, 2001) (same); *Phillips and Jordan v. Watts*, 13 F.Supp.2d 1308 (N.D. Fla. 1998) (same); *Buddie*, 31 F.Supp. 571 (same); *Arrow Office Supply Co. v. City of Detroit*, 826 F.Supp. 1072 (E.D. Mich. 1993) (same).

Respectfully submitted,

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Table of Contents, Appendix
Adarand Brief on the Merits

Page

United States General Accounting Office, *Report to Congressional Committees, Disadvantaged Business Enterprises, Critical Information Is Needed To Understand Program Impact*, June 2001 .....App. 1

13 CFR § 124.103 (2001) .....App. 63

13 CFR § 124.104 (2001) .....App. 67

13 CFR § 124.1002 (2001) .....App. 70

13 CFR § 124.1014 (2001) .....App. 73

48 CFR § 19.000 (2000) .....App. 74

48 CFR § 19.201 (2000) .....App. 76

48 CFR § 19.702 (2000) .....App. 82

48 CFR § 19.704 (2000) .....App. 84

48 CFR § 19.705-4 (2000).....App. 89

48 CFR § 19.705-5 (2000).....App. 93

48 CFR § 19.705-7 (2000).....App. 94

48 CFR § 19.707 (2000) .....App. 98

48 CFR Subpart 19.11 (2000) .....App. 99

48 CFR § 19.1202 (2000) .....App. 102

48 CFR § 19.1203 (2000) .....App. 105

48 CFR § 19.1204 (2000) .....App. 106

48 CFR § 52.219-26 (1999).....App. 107

49 CFR § 26.1 (2000).....App. 108

Table of Contents, Appendix
Adarand Brief on the Merits – Continued

Page

49 CFR § 26.3 (2000).....App. 109
49 CFR § 26.5 (2000).....App. 110
49 CFR § 26.7 (2000).....App. 117
49 CFR § 26.51 (2000).....App. 118
49 CFR § 26.61 (2000).....App. 124
49 CFR § 26.63 (2000).....App. 125
49 CFR § 26.67 (2000).....App. 126
49 CFR § 26.83 (2000).....App. 130
49 CFR § 26.87 (2000).....App. 134
49 CFR Part 26, App. E (2000).....App. 140

APPENDIX

United States General Accounting Office

Report to Congressional Committees

June 2001

DISADVANTAGED BUSINESS ENTERPRISES

Critical Information Is Needed to Understand Program Impact

[SEAL]

Contents

Appendix I: Section of the Transportation Equity Act for the 21st Century Requiring GAO's Study

Appendix II: GAO's Survey Instrument and Overall Results

Appendix III: Objectives, Scope, and Methodology

Appendix IV: Comments From the U.S. Department of Transportation

Appendix V: GAO Contacts and Staff Acknowledgments

Figure 1: Percentage of Federal Highway Contract Dollars Awarded to DBEs, Fiscal Year 1999

Figure 2: DBEs' Participation in Federal Transportation Contracting in Minnesota, 1995-2000

Figure 3: MBE/WBEs' Participation in Louisiana's State-Funded Transportation Contracting, 1992-2000

Abbreviations

DBE	Disadvantaged Business Enterprise
DOCR	Department of Transportation's Office of Civil Rights
DOJ	Department of Justice
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
GAO	General Accounting Office
MBE/WBE	Minority Business Enterprise/Women Business Enterprise
SBA	Small Business Administration
TEA-21	Transportation Equity Act for the 21st Century
UCP	Unified Certification Program
USDOT	Department of Transportation

June 1, 2001

Congressional Committees

The U.S. Department of Transportation's (USDOT) Disadvantaged Business Enterprise (DBE) program is designed to remedy the effects of current and past discrimination against small businesses owned and controlled by

socially and economically disadvantaged individuals and to foster equal opportunity in transportation contracting. The Surface Transportation Assistance Act of 1982 contained the first statutory DBE provision for federal highway and transit programs, requiring that at least 10 percent of the funds provided be expended with DBEs, unless the Secretary of Transportation determined otherwise. From 1983 through 1999, about $35 billion of the federal funds expended through USDOT-assisted highway and transit contracts went to DBEs. Congressional debate preceding the passage in 1998 of the Transportation Equity Act for the 21st Century (TEA-21), which reauthorized the DBE program, focused largely on the need for and impact of the DBE program. USDOT issued new regulations in 1999 that significantly altered the DBE program. These regulations were designed to respond to issues raised in the congressional debate and the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena.*

In addition to reauthorizing the DBE program, TEA-21 required that we review the program's impact throughout the United States and directed us to include analyses of specific program-related issues in our review.[1] (See app. I for the section of TEA-21 requiring our study.) Accordingly, this report provides information on (1) important

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[1] Under TEA-21, at least 10 percent of the highway, transit, and research funds authorized by the act are to be expended with DBEs, unless the Secretary of Transportation determines otherwise. This report focuses on the DBE program applicable to state departments of transportation and transit authorities with respect to USDOT-assisted highway and transit contracts rather than on direct expenditures of federal funds by USDOT.

changes made to the DBE program since 1999, (2) characteristics of DBEs and non-DBEs that receive USDOT-assisted highway and transit contracts, (3) evidence of discrimination and other factors that may limit DBEs' ability to compete for USDOT-assisted contracts, and (4) the impact of the DBE program on costs, competition, and job creation and the impact of discontinuing the federal and nonfederal DBE programs.

To address these issues, we conducted a nationwide mail survey in October 2000 of the 52 state departments of transportation (including those of the District of Columbia and Puerto Rico) and the 36 largest transit authorities.[2] We received responses to our survey from all 52 state departments of transportation (states) and 31 transit authorities, for an overall response rate of 94 percent. Our survey instrument and overall results are included in appendix II and selected survey results are available at www.gao.gov/special.pubs/dbe. We also assessed USDOT's DBE program data, reviewed court cases addressing the constitutionality of USDOT's DBE program since 1995, and analyzed transportation-specific

[2] Transit authorities provide local or regional multiple-occupancy-vehicle passenger services for general public use. We planned to survey all transit authorities required to submit DBE program plans. However, the Federal Transit Administration (FTA) could not provide an accurate list of these transit authorities. Therefore, we surveyed the 36 largest transit authorities (as defined by the number of unlinked passenger trips in 1999) across the nation. These transit authorities accounted for two-thirds of the federal transit grant funds obligated in 1999.

disparity studies.[3] This report is not a compliance review and therefore does not address whether states and transit authorities followed the DBE program regulations or how USDOT enforced those regulations, particularly with respect to the certification of DBEs. (See app. III for a more detailed discussion of our report's scope and methodology.)

Results in Brief

The DBE program has changed significantly since USDOT issued new regulations in 1999, in part, to respond to a 1995 Supreme Court decision that heightened standards for federal programs that use race or ethnicity as a criterion in decision-making. The new regulations overhauled the DBE goal-setting process. States and transit authorities are no longer required to justify goals lower than 10 percent – the amount identified in the statutory DBE provision. Rather, goals are to be based on the number of "ready, willing, and able" DBEs in local markets. In addition, states and transit authorities must now use race-neutral measures (i.e., measures intended to help all small businesses, not just DBEs), such as outreach and technical assistance, to the greatest extent possible to

[3] These disparity studies measure the availability and utilization of minority- and women-owned businesses in transportation contracts. We chose to review only transportation-specific disparity studies published between 1996 and 2000, in part, because the DBE regulations state that any disparity study used in the DBE goal-setting process should be as recent as possible and focused on the transportation contracting industry.

achieve their DBE goals. Furthermore, the new regulations revised the eligibility requirements to include a personal net worth cap of $750,000 for the individuals who own and control DBEs. States and transit authorities were required to submit to USDOT new DBE program plans that reflected the new regulations in August 1999. About three-fourths of the states and transit authorities responding to our survey reported that the new regulations have made it more difficult for them to administer the DBE program. Furthermore, over half of the states and transit authorities indicated that the new regulations made it more difficult for DBEs to apply to the program. These views are probably attributable to the new goal-setting process that states and transit authorities must complete and the additional paperwork that DBEs must submit.

A lack of key information prevents anyone from gaining a clear understanding of the firms that participate in the DBE program and how these firms compare with the rest of the transportation contracting community. For example, we cannot calculate the total number of certified DBEs nationwide because of duplication in states' and transit authorities' DBE directories. In addition, about two-thirds of our survey respondents could not provide information on the annual gross receipts of DBEs or the personal net worth of the individuals who own and control DBEs – information that is required to determine eligibility for the program but is not reported to USDOT. The primary reason states and transit authorities cited for not being able to provide this information was that the

information was not in an electronic database and therefore would be too difficult and time-consuming to compile. Moreover, states and transit authorities are just starting to collect personal net worth information as required by the new regulations. In addition, about 95 percent of the states and transit authorities we surveyed could not provide information on the annual gross receipts of non-DBEs, and none could provide information on the personal net worth of the individuals who own and control non-DBEs. Although financial information on DBEs and non-DBEs is lacking, the majority of the states and transit authorities could provide basic information on DBEs, such as the total number of prime contracts awarded to the firms – information that is regularly reported to USDOT. These data indicate that DBEs received about 7 percent of the prime contracts awarded and 2 percent of the federal dollars awarded for prime contracts in fiscal year 2000.

A variety of sources could provide information relevant to whether discrimination limits the ability of DBEs to compete for USDOT-assisted contracts. These sources include relevant court cases; studies of lending, bonding, and business practices affecting the formation and competition of such firms; state and local disparity studies; and discrimination complaints. Our review focused on court cases addressing the constitutionality of the federal DBE program; transportation-specific disparity studies; and written complaints of discrimination filed by DBEs with states, transit authorities, and USDOT. We focused on these sources because they are directly related to transportation contracting and the federal DBE program. In summary, we found the following:

- The federal courts that have considered the constitutionality of USDOT's DBE program under the standard adopted by the Supreme Court in 1995 have concluded that discrimination adversely affects DBEs. These decisions were based on various types of evidence, including studies of business practices affecting DBE formation and competition, and disparity studies. In these cases, the courts found that the evidence of discrimination presented was sufficient for them to conclude that the federal DBE program serves a compelling governmental interest, namely, providing a remedy for that discrimination.

- Studies finding statistical disparities between the availability and utilization of minority- and women-owned firms in transportation contracting are recognized as a potential source of evidence of discrimination. As a result, numerous state and local governments have conducted disparity studies to support their minority contracting programs and to help set their federal DBE participation goals. All 14 studies we reviewed found that there were disparities between the availability and utilization of minority- and women-owned businesses in transportation contracts. Taken as a whole, these studies suggest that disparities exist; however, we found significant weaknesses in the disparity studies we reviewed. For example, the studies consistently overstated the number of qualified, willing, and able firms or understated firms' utilization in transportation contracts. The weaknesses we identified create uncertainties about the studies' findings – that is, they could result in either an overstatement or an understatement of minority- and women-owned businesses availability and utilization.

- USDOT does not systematically track information on complaints of discrimination filed with the Department by DBEs – information that could shed light on the existence of discrimination against DBEs. For example, although USDOT receives written discrimination complaints filed by DBEs, it could not provide the total number of such complaints, the total number of investigations launched, or the outcomes of the investigations. We also asked states and transit authorities about written discrimination complaints filed by DBEs in 1999 and 2000. Eighty-one percent of the states and transit authorities reported that they did not receive any written complaints of discrimination filed by DBEs during this period. Nineteen percent of the states and transit authorities reported that they received a total of 31 written discrimination complaints from DBEs in 1999 and 2000. Of the 31 complaints filed, 29 had been investigated. Four of these investigations resulted in findings of discrimination.

Other factors may also limit the ability of DBEs to compete for USDOT-assisted contracts. According to our survey results, the majority of the states and transit authorities we surveyed had not conducted any type of analysis to identify these factors. Using anecdotal information, we identified a number of factors, or barriers, such as a lack of working capital and limited access to bonding, that may limit DBEs' ability to compete for

contracts. However, there was little agreement among the officials we contacted on whether these factors were attributable to discrimination.

Limited data prevent a thorough assessment of the impact of the DBE program, including the impact on DBEs of discontinuing the federal or nonfederal DBE programs. We identified one state and one transit authority that had discontinued their federal DBE programs as a result of court decisions. In addition, through our survey, we identified 10 other states and transit authorities that had participated in nonfederal DBE programs that had been discontinued. Ten of these 12 states and transit authorities could not provide sufficient data for us to fully evaluate the impact of this action. The data provided from the remaining two states indicate that discontinuing the federal and nonfederal programs had a negative impact on minority- and women-owned businesses.

Our report contains several recommendations to USDOT designed to (1) enhance the collection of data so that more and better information will be available to evaluate the impact of the DBE program and (2) help states and transit authorities set DBE participation goals that reflect the availability of ready, willing, and able DBEs in the relevant market. We recognize that implementing these recommendations may result in some additional costs for USDOT, states, and transit authorities. However, given existing data collection requirements and the benefits associated with these recommendations, we believe such costs are warranted. We provided USDOT with a draft of this report for review and comment. USDOT did not comment on our recommendations but offered comments

on such areas as the role of disparity studies in the DBE program, the need for states and transit authorities to use the best available data in DBE goal-setting, and the status of DBE and non-DBE participation data.

Background

USDOT established a minority and women's business enterprise program for its highway, airport, and transit programs by regulation in 1980. The Surface Transportation Assistance Act of 1982 contained the first statutory DBE provision for federal highway and transit programs, requiring that a minimum of 10 percent of the funds provided by the act be expended with small businesses owned and controlled by socially and economically disadvantaged individuals, unless the Secretary of Transportation determined otherwise. Nonminority women were not included as socially and economically disadvantaged individuals. The Surface Transportation and Uniform Relocation Assistance Act of 1987 continued the program and included nonminority women in the statutory definition of socially and economically disadvantaged individuals, thereby allowing states to use contracts with both minority- and women-owned businesses to meet their DBE goals. The Intermodal Surface Transportation Efficiency Act of 1991 and TEA-21 (1998) reauthorized the program, continuing the combined 10- percent provision for participation by minority-owned and nonminority-women-owned DBEs. The percentage of federal funds expended through USDOT-assisted highway and transit contracts with DBEs increased from 9.9 percent in 1983 to 12.8 percent in 1999.

TEA-21 and USDOT's regulations establish the basic eligibility requirements for participation in the DBE program. The program is limited to small businesses owned and controlled by socially and economically disadvantaged individuals. Women and members of certain minority populations, such as African-, Hispanic-, and Native-Americans and other minorities found to be disadvantaged by the Small Business Administration (SBA), are presumed to be socially and economically disadvantaged unless proved otherwise.[4] These individuals must own at least 51 percent of the firm and actually control its operations. To qualify as a small business, a firm must have average annual gross receipts over a 3-year period that do not exceed either (1) the applicable SBA small business size standards[5] or (2) a USDOT-specific cap ($17.4 million).[6] There is no legislative or administrative

[4] Firms owned and controlled by those who are not presumed to be socially and economically disadvantaged may qualify for the program if the owner can demonstrate disadvantage. However, no individual whose personal net worth exceeds $750,000 may be considered economically disadvantaged. This amount does not include the individual's interest in the business or equity in a primary residence.

[5] SBA's size standards define the maximum size at which a firm can be considered a small business. The size standards are usually defined by the number of employees or the average annual receipts.

[6] TEA-21 established a cap of $16.6 million, but authorized the Secretary of Transportation to adjust this amount for inflation. In August 2000, USDOT raised this cap from $16.6 million to $17.4 million. Since the change was effective only for the last 2 months of fiscal year 2000, we used the $16.6 million figure when we asked in our questionnaire for fiscal year 2000 data on annual gross receipts.

requirement limiting the length of time firms can participate in the program. However, DBEs become ineligible, or "graduate," when their average annual gross receipts over a 3-year period exceed the applicable SBA small business size standards or the USDOT-specific cap. According to our survey results, most of the states and transit authorities did not have any DBEs graduate in 2000. In addition, about one-quarter of the states and transit authorities we surveyed could not provide this information. States and transit authorities are not required to track this information, and graduation is not a goal of the DBE program. Moreover, as we reported in 1994,[7] because average annual gross receipts do not reliably indicate DBEs' success, graduation is not a useful measure of the success of the program as a whole.

USDOT administers the DBE program through the Office of the Secretary and the Department's operating administrations, including the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA). USDOT develops program policies, instructions, and procedures; reviews and approves states' and transit authorities' DBE program plans; and provides technical assistance, among other things. States and transit authorities must certify that program applicants meet the eligibility criteria, reassess annually the eligibility of certified businesses, and establish overall annual goals for the participation of DBEs in their USDOT-assisted contracts. DBE participation goals are expressed as a percentage of

[7] *Highway Contracting: Disadvantaged Business Program Meets Contract Goal, but Refinements Are Needed* (GAO/RCED-94-168, Aug. 17, 1994).

all federal highway and transit funds expended on USDOT-assisted contracts in a fiscal year.

One of the sources states and transit authorities may use to help set their overall federal DBE participation goals is data derived from disparity studies, which measure the availability of minority- and women-owned businesses compared with their utilization in contracting. States and transit authorities also use disparity studies to support state and local minority business contracting programs. The significance of disparity studies as evidence of discrimination in this context was discussed in a 1989 Supreme Court decision.[8] In *City of Richmond v. J.A. Croson Co.*,[9] the Court held that state and local programs that use race or ethnicity as a factor in apportioning public contracting opportunities are subject to strict scrutiny.[10] This means that the programs must serve a

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[8] This decision does not address state and local governments' implementation of the federal DBE program. Furthermore, several members of the Court stated that, unlike state and local governments, the Congress legislates on a nationwide basis and has inherently broader powers to remedy discrimination. Therefore, the Congress may deserve greater deference than state and local governments. Also, we note disparity studies are not required to support their participation in the federal program.

[9] 488 U.S. 469 (1989).

[10] The purpose of strict scrutiny is to ensure that the goal of the program is important enough to warrant treating people differently on the basis of their race or ethnicity and that the means chosen to achieve the goal fit it so closely that there is little or no possibility that an illegitimate prejudice or stereotype is the motive for such different treatment. Programs that use gender as a factor in decision-making are subject to a more lenient standard than those involving race or ethnicity.

compelling governmental interest and be narrowly tailored – that is, designed to be no broader than necessary – to meet that interest.

The Court found that combating racial discrimination is a compelling interest. However, it held that the city had not presented sufficient evidence of discrimination to justify its minority contracting plan. In evaluating the city's evidence, the Court found, among other things, that the city had inappropriately relied on the disparity between the number of prime contracts awarded to minority firms and the minority population of Richmond. It stated that an appropriate disparity evaluation would compare the percentage of qualified minority contractors with the percentage of dollars actually awarded to minority businesses.[11] While courts have favorably cited disparity studies in some cases,[12] many courts have rejected the studies' findings, often because of methodological weaknesses, when considering whether a compelling interest

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These programs must be substantially related to the achievement of an important governmental interest.

[11] Several members of the Court emphasized that an inference of discrimination could arise from a significant statistical disparity between the number of qualified, willing, and able minority contractors and the number actually engaged to perform a particular service.

[12] *See, e.g., Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990) and *Concrete General, Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370 (D. Md. 1991) (both finding that statistical analyses presented in connection with motions for summary judgment did not suffer from the defects identified by the Supreme Court in *Croson*).

exists for state or local minority contracting programs.[13] These decisions provide varying degrees of guidance on the data and methodology that need to be used in disparity studies to produce reliable evidence of discrimination.

A 1995 Supreme Court decision had a significant impact on the federal DBE program, as well as other federal programs that use race or ethnicity as factors in decision-making. *Adarand Constructors, Inc. v. Pena*[14] involved FHWA's use of a subcontracting compensation clause in direct federal contracting to implement the DBE

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[13] *See, e.g., W.H. Scott Construction Co., Inc. v. City of Jackson,* 199 F.3d 206 (5th Cir. 1999) (study did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool for the city's program); *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d 895 (11th Cir. 1997), *cert. denied,* 523 U.S. 1004 (1998) (marketplace study included the number of licensed construction contractors rather than the number of firms willing, able, or qualified to perform work on county construction contracts and data on certain minority and women contractors did not contain any statistically significant unfavorable disparities after accounting for firm size); *Concrete Works of Colorado, Inc. v. City and County of Denver,* 86 F. Supp. 2d 1042 (D. Col. 2000) (studies assumed that all existing firms were available to perform within applicable time constraints and aggregated available minority firms regardless of their size or the services they performed); *Phillips & Jordan, Inc. v. Watts,* 13 F. Supp. 2d 1308 (N.D. Fla. 1998) (study assumed that every firm included in selected standard industrial codes was qualified, willing, and able to bid on road maintenance contracts and calculated availability and utilization rates on a statewide basis, even though contracts were let on the district level).

[14] 515 U.S. 200 (1995).

provision and provisions of the Small Business Act.[15] Adarand Constructors, a nondisadvantaged contractor, initiated the litigation in 1990 after it was denied a subcontract on a federal lands highway project. In 1992, the district court held that the programs at issue were constitutional, and in 1994 the Tenth Circuit Court of Appeals affirmed that decision.[16] In 1995, the Supreme Court set aside the Court of Appeals' decision and sent the case back to the lower courts, directing them to apply the strict scrutiny standard and thus determine whether the programs were narrowly tailored to further a compelling governmental interest. Applying this standard, the district court held that the subcontracting compensation clause and related statutory provisions were unconstitutional in 1997.[17] This decision was the subject of considerable discussion during the congressional debate over the

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[15] The subcontracting compensation clause provided prime contractors additional compensation for hiring subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals.

[16] *Adarand Constructors, Inc. v. Pena,* 16 F.3d 1537 (10th Cir. 1994); *Adarand Constructors, Inc. v. Skinner,* 790 F. Supp. 240 (D. Colo. 1992).

[17] *Adarand Constructors, Inc. v. Pena,* 965 F. Supp. 1556 (D. Colo. 1997). On appeal, the Tenth Circuit Court of Appeals found that the case was moot since Adarand Constructors had been certified as a DBE after the district court's decision. *Adarand Constructors, Inc. v. Slater,* 169 F.3d 1292 (10th Cir. 1999). However, the Supreme Court held that the case was not moot and directed the Tenth Circuit Court of Appeals to consider the district court's 1997 decision. *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216 (2000).

reauthorization of the DBE program as part of TEA-21, which was enacted in 1998.[18]

Responding largely to the Supreme Court's 1995 decision and congressional debate over the DBE program, USDOT issued regulations in 1999 to ensure that the DBE program is narrowly tailored. In addition, the regulations are designed to ensure nondiscrimination in the award and administration of USDOT-assisted contracts, remove barriers to the participation of DBEs in such contracts, and provide appropriate flexibility to the recipients of federal funds in establishing and providing opportunities to DBEs, among other things. In September 2000, the Tenth Circuit Court of Appeals upheld the constitutionality of the current DBE program because it found that the program served a compelling governmental interest and was narrowly tailored, largely because of structural changes in the program resulting from USDOT's new regulations.[19] Adarand Constructors requested that the Supreme Court review the Court of Appeals' decision in November 2000. In March 2001, the Supreme Court agreed to hear the case.[20]

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[18] USDOT believes that the Congress established a compelling governmental interest in the DBE program through the body of evidence that supporters of the program presented during the congressional debate over the program and the subsequent reauthorization of the DBE provision in TEA-21.

[19] *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000). By the time of the Tenth Circuit Court of Appeals' decision, FHWA had discontinued its use of the subcontracting compensation clause.

[20] *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1401, *amended by* 69 U.S.L.W 3670 (U.S. Apr. 13, 2001) (No. 00-730).

USDOT's New Regulations Significantly Changed the DBE Program

USDOT's 1999 DBE regulations made significant changes to the DBE program. For example, the new regulations overhauled the program's goal-setting process, including the use of race-neutral measures (e.g., technical assistance) and revised its eligibility requirements. In addition, the new regulations required that states and transit authorities develop bidders lists and unified certification programs, among other things, to make the DBE program more streamlined and efficient. However, 72 percent of the states and transit authorities responding to our survey indicated that the new regulations have made it more difficult for them to administer the program. In addition, over half of the states and transit authorities indicated that the new regulations have made it more difficult for DBEs to apply to the program.

New Goal-Setting Process Shifts Focus of Program

The new goal-setting process shifted the focus of the program from achieving the maximum feasible extent of DBE participation in USDOT-assisted contracting to achieving a "level playing field" – that is, the amount of participation DBEs would be expected to achieve in the

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The Supreme Court will address the following two questions: (1) Did the court of appeals misapply the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination? and (2) Is USDOT's current DBE program narrowly tailored to serve a compelling government interest?

absence of discrimination. For example, under the prior regulations, states and transit authorities were required to justify goals lower than 10 percent – the amount identified in the statutory DBE provision. The regulations established a direct link between the amount of participation identified in the statute and the goals set by states and transit authorities. In contrast, the new regulations require states and transit authorities to base their DBE participation goals on demonstrable evidence of the number of "ready, willing, and able" DBEs available in local markets relative to the number of all businesses "ready, willing, and able" to participate in USDOT-assisted contracts in such markets – representing the level of DBE participation expected in the absence of discrimination.[21]

The regulations outline a two-step process for goal-setting. First, states and transit authorities must establish a base figure that represents the "ready, willing, and able" DBEs in the state or transit authority's market relative to all "ready, willing, and able" firms in that market (i.e., relative availability of DBEs). To determine the relative availability of DBEs, the new regulations require that states and transit authorities use the best available data and suggest that states and transit authorities use DBE directories and Census Bureau data, bidders lists, disparity studies, or the goal of another recipient. Second,

[21] According to the new regulations, the 10-percent goal established in TEA-21 is an aspirational goal at the national level that USDOT will use as a means of evaluating the overall performance of the DBE program nationwide; however, it is not tied to individual states and transit authorities and does not require that states and transit authorities set a 10-percent goal.

states and transit authorities must adjust their base figure to account for other factors affecting DBEs, such as the capacity of DBEs to perform work in USDOT-assisted contracts and findings from disparity studies. According to our survey results, the most common sources used to set states' and transit authorities' fiscal year 2000 participation goals were DBE directories, historical utilization patterns, Census Bureau data, and bidders lists. Under the new goal-setting process, the average DBE participation goal decreased from 14.6 percent in fiscal year 1999 to 13.5 percent in fiscal year 2000.

The new regulations also require that states and transit authorities meet the maximum feasible portion of their overall DBE goals using race-neutral measures rather than race-conscious measures. The prior regulations did not require the use of race-neutral measures (e.g., outreach and technical assistance), which are designed to increase contracting opportunities for all small businesses, and do not involve setting specific goals for the use of DBEs on individual contracts. A race-conscious measure is one that is focused solely on assisting DBEs. An example of a race-conscious measure is a contract goal – that is, a DBE participation goal set for a specific contract or project. While quotas are prohibited and set-asides are allowed only in the most extreme cases of discrimination, states and transit authorities must use contract goals to meet any portion of their overall goals they do not expect to meet using race-neutral measures.[22]

[22] To the extent that race-conscious measures are no longer needed to achieve overall goals, states and transit authorities must discontinue their use.

States and transit authorities must submit their overall DBE participation goals, including the methodology used to set the goals and the projected use of race-neutral and race-conscious measures, to USDOT for approval on an annual basis. The states and transit authorities we surveyed indicated that, on average, they used race-neutral measures to achieve slightly over one-third of their overall DBE participation goals in fiscal year 2000.

New Eligibility Requirement Focuses on Owners' Personal Wealth

The new regulations established a personal net worth cap for individuals whose ownership and control of a business determines DBE eligibility. According to USDOT, this new eligibility requirement is designed to ensure that the program is limited to firms owned and controlled by genuinely disadvantaged individuals. Prior to the new regulations, the absence of a limit on personal net worth led to criticism that wealthy individuals could benefit from the program. Under the new regulations, to qualify as economically disadvantaged, individuals who own and control DBEs must have a personal net worth that does not exceed $750,000. USDOT chose the $750,000 cap because it is a well-established standard for the SBA's programs. According to our survey results, the number of firms that exceeded this limit and became ineligible for the DBE program in fiscal year 2000 ranged from 0 in 14 states and transit authorities to 39 in 1 state. Twenty-two percent of the states and transit authorities we surveyed reported that this information was not available.

New Regulations Include Other Requirements to Improve the DBE Program

The new regulations include other changes designed to improve the effectiveness and efficiency of the DBE program. For example, states and transit authorities are now required to create and maintain a bidders list, which is a record of all firms that bid on prime and subcontracts for USDOT-assisted projects. The list must include each firm's name, its status as a DBE or non-DBE, its years in operation, and its annual gross receipts.[23] The list is intended to count all firms that are participating, or attempting to participate in USDOT-assisted contracts; however the regulations do not specify how often the bidders list must be updated, for example, to ensure that firms no longer available are removed from the list. USDOT believes that the bidders list is a promising tool for states and transit authorities to accurately measure the relative availability of "ready, willing, and able" DBEs when setting their DBE goals. Sixty percent of the states and transit authorities we surveyed reported that they are in the process of developing or implementing their bidders lists while 27 percent indicated that their lists are fully implemented. Eight percent of the states and transit authorities reported that they had not yet started developing their bidders lists. The remaining 5 percent of the states and transit authorities reported that their bidders lists were in some other stage of development.

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[23] USDOT issued an interim final rule in November 2000, specifying that states and transit authorities could collect annual gross receipts information from firms in ranges rather than exact figures.

Another change designed to improve the efficiency of the DBE program is the requirement that states and transit authorities develop and participate in a unified certification program (UCP). A UCP provides "one-stop shopping" for DBEs because it makes all DBE certification decisions within a state. All recipients within a state must honor the certification decisions of the UCP. Prior to the new regulations, DBEs often had to obtain separate certifications from multiple recipients within one state. For example, in California there were about 60 certifying agencies throughout the state. Under the new regulations, DBEs will have to be certified by only one agency to participate in the DBE programs administered by all recipients in that state. By March 2002, the state DOT and all transit authorities within each state must sign an agreement establishing the UCP for that state and submit an implementation plan to USDOT for approval. The UCP must be fully operational no later than 18 months after USDOT approves the plan. The majority of the states and transit authorities (72 percent) we surveyed indicated that their UCPs were in some stage of development or implementation while 7 percent indicated that their UCPs were fully implemented; 14 percent reported that they had not yet started to develop their UCPs; and the remaining 6 percent noted that their UCPs were in some other stage of development.[24]

[24] Percentages do not add to 100 percent because of rounding.

New Regulations Make Application to and Administration of the DBE Program More Difficult

Fifty-four percent of the states and transit authorities we surveyed indicated that the new regulations had made it somewhat or much more difficult for DBEs to apply to the DBE program. This view could be attributable to the requirement for additional documentation that DBEs must now submit – specifically, documentation of the personal net worth of the individuals who own and control the firms. Furthermore, when states and transit authorities were asked to identify barriers to firms' participation in the DBE program, the two most common barriers cited were (1) reluctance to provide personal information and (2) the time required for certification paperwork. Despite these problems, most states and transit authorities (58 percent) indicated that they believe the benefits to firms participating in the DBE program outweigh any costs.

In addition, states and transit authorities reported that the new regulations made it more difficult to administer the program. For example, 59 of 82 states and transit authorities we surveyed reported that the new regulations had made it somewhat or much more difficult to administer the DBE program while 9 states and transit authorities indicated that the new regulations had made it easier to administer the program.[25] Fourteen states and transit authorities reported that there was no change orthey had no basis to judge. It is not surprising that most states and transit authorities reported that the new

[25] One survey respondent did not answer this question.

regulations made it more difficult to administer the DBE program, since the new regulations required that they completely overhaul their DBE goal-setting process and collect more information from DBEs and non-DBEs.

One source of frustration for states and transit authorities appears to be the process for developing and approving the new DBE program plans. The new regulations required that states and transit authorities develop and submit plans for fiscal year 2000 that reflected the requirements and changes under the new regulations to USDOT by August 31, 1999 – about 6 months after the effective date of the new regulations. During the approval process, USDOT sometimes sent the DBE plans back to states and transit authorities multiple times for revisions and clarifications.[26] One state noted that even after it had worked closely with USDOT's local office to develop its plan, USDOT headquarters twice rejected the plan. On average, it took USDOT 8 months to approve the 2000 DBE plans. According to our survey results, one state and seven transit authorities reported that their 2000 DBE plans had yet to be approved.

Limited Data Are Available on the Characteristics of DBEs and Non-DBEs

A lack of key information prevents anyone from gaining a clear understanding of firms that participate in the DBE program and how they compare with the rest of the

[26] According to USDOT, the plans were reviewed to ensure that they met legal requirements.

transportation contracting community. For example, we cannot use the information provided by the states and transit authorities we surveyed to calculate the total number of certified DBEs nationwide because of duplication in the states' and transit authorities' DBE directories. In addition, almost two-thirds of our survey respondents could not provide information on the annual gross receipts of DBEs or the personal net worth of the individuals who own and control DBEs – information that is used to determine firms' eligibility for the program but is not reported to USDOT and was not readily available. Furthermore, almost 95 percent of the states and transit authorities we surveyed could not provide information on the annual gross receipts of non-DBEs and none could provide information on the personal net worth of the individuals who own and control non-DBEs. While financial information on DBEs and non-DBEs is lacking, most states and transit authorities could provide some other type of information on DBEs, such as the total number of prime contracts awarded to DBEs – information that is regularly reported to USDOT. These data indicate, among other things, that DBEs received about 7 percent of the prime contracts awarded and 2 percent of the federal dollars awarded for prime contracts in fiscal year 2000.

Duplication and Data Problems Preclude Thorough Analysis of the DBE Community

We cannot calculate the total number of certified DBEs nationwide because of duplication in states' and transit authorities' DBE directories. States and transit authorities are required to maintain DBE directories that list all the

DBEs they have certified.[27] However, DBEs can be certified in multiple locations. For example, a DBE may be certified by Virginia, Maryland, Pennsylvania, and the District of Columbia. Unlike the SBA's Small and Disadvantaged Business program, which gives a unique identification number to each certified small and disadvantaged business, the DBE regulations do not require states and transit authorities to assign unique identifiers to certified DBEs. As a result, a DBE certified with four states would be listed in four different DBE directories. Because of this duplication, aggregating the number of certified DBEs listed in states' and transit authorities' DBE directories would significantly overstate the number of firms certified. While we cannot provide the total number of certified DBEs nationwide, our survey results indicate that the number of certified DBEs per state and transit authority varies greatly. For example, in fiscal year 2000, the number of certified DBEs per state or transit authority ranged from 39 in the state of Maine[28] to 3,350 in the Metropolitan Atlanta Rapid Transit Authority, with an average of 551 per state and transit authority.

Although FHWA could provide information on the demographics of DBEs that obtain highway contracts, FTA could not provide comparable data. As a result, the demographics of the entire DBE community are

[27] The DBE directories must be updated at least annually.

[28] The Metropolitan Transit Authority of Harris County (Houston, Texas) reported that it had no certified DBEs in 2000. According to USDOT, the Metropolitan Transit Authority has a DBE program, with a goal intended to be met with all race-neutral participation, but does not certify firms itself.

unknown. FHWA's data on DBE participation indicate that nonminority-women-owned businesses obtain a significant portion of contracts. Prior to 1987, states and transit authorities could not generally count contracts with nonminority-owned businesses toward DBE goals. The Surface Transportation and Uniform Relocation Assistance Act of 1987 included nonminority-women-owned businesses in the statutory definition of socially and economically disadvantaged individuals and thus allowed states and transit authorities to use contracts with both minority- and nonminority-women owned businesses to meet their DBE goals. According to FHWA's data, nonminority-women-owned businesses have become one of the most competitive groups in the DBE community since 1987. For example, in 1999 (the latest year for which these data are available), nonminority-women-owned businesses accounted for about 48 percent of all federal highway contract dollars awarded to DBEs; minority-owned businesses (those owned by both men and women) combined accounted for about 52 percent. (See fig. 1. [Figure 1 omitted in printing]) FTA was unable to provide reliable data on the demographics of the DBEs that were awarded federal transit contracts, even though transit authorities must provide this information to FTA on a quarterly basis.[29] According to FTA, it does not centrally compile this information.

[29] States and transit authorities must submit certain information about DBEs to USDOT on a quarterly basis, such as number of firms awarded prime and subcontracts, the ethnicity of the firms' owners, and the type of work the firms perform.

Data Are Available to Calculate Participation Rate of DBEs in Prime Contracts but Are Limited for Subcontracts

The majority of the states and transit authorities we surveyed (78 percent) provided sufficient data – that is, the number and value of prime contracts awarded to DBEs and non-DBEs – to determine DBEs' participation rates in prime contracts.[30] According to the data we obtained from these states and transit authorities, DBEs received about 7 percent of the prime contracts awarded and 2 percent of the federal dollars awarded for prime contracts in fiscal year 2000. In comparison, about 70 percent of the states and transit authorities could not provide both the number and value of subcontracts awarded to DBEs and non-DBEs – information necessary to calculate DBEs' participation rates in subcontracts. Because DBEs are small businesses and are more likely to compete for subcontracts, which generally require fewer resources (e.g., capital, equipment, and employees) than prime contracts, the lack of subcontracting data prevents anyone from gaining a complete understanding of DBEs' participation in transportation contracting. The data provided from about one-third of the states and transit authorities indicate that DBEs received about 33 percent of all subcontracts awarded and 26 percent of the federal dollars awarded through subcontracts in fiscal year 2000. However, because this information is based on a small number of states and transit authorities, it may not be

[30] We measured DBEs' participation rates in USDOT-assisted contracts using both the number and value of the prime and subcontracts awarded.

representative and therefore should not be generalized to the entire DBE community.

The participation rates of DBEs in both prime and subcontracts in fiscal year 2000 indicate that they received a relatively small percentage of federal prime and subcontracts and dollars when compared with non-DBEs. However, we do not know whether the percentage is disproportionately low. Such a determination cannot be made without an accurate measure of the availability of DBEs – that is, the number of DBEs "ready, willing, and able" to participate in prime and subcontracts compared with the number of non-DBEs.

Financial Profile of DBEs Cannot Be Determined With Current Data

The majority of states and transit authorities responding to our survey could not provide information on the annual gross receipts of DBEs. Specifically, 60 percent of these states and transit authorities could not provide information on the annual gross receipts of the DBEs that were awarded prime or subcontracts in fiscal year 2000. Furthermore, 75 percent of the states and transit authorities could not provide information on the annual gross receipts of the DBEs that were not awarded prime or subcontracts in fiscal year 2000. While the annual gross receipts of a DBE are required to determine the firm's eligibility for the program, this information is not reported to USDOT. The primary reason survey respondents cited for not being able to provide the information was that the information is not in an electronic database and therefore would be difficult and time-consuming to

compile. The information that was provided from a limited number of states and transit authorities indicates that most DBEs' annual gross receipts are below $5 million – well below the current USDOT-specific cap of $17.4 million. Furthermore, 85 percent of the DBEs awarded contracts in fiscal year 2000 had annual gross receipts of less than $5 million. In comparison, 94 percent of the DBEs that did not receive a contract in fiscal year 2000 had annual gross receipts of less than $5 million. However, because this information is based on only a small percentage of the states and transit authorities we surveyed, it may not be representative and therefore should not be generalized to the entire DBE community. (For more detailed information see app. II.)

The majority of the states and transit authorities we surveyed could not provide information on the personal net worth of the individuals who own and control DBEs. Specifically, about 65 percent of the states and transit authorities indicated that they could not provide information on the personal net worth of the owners of DBEs that were awarded prime contracts in fiscal year 2000. Sixty-seven percent of the states and transit authorities reported that they could not provide information on the personal net worth of the owners of DBEs that were awarded subcontracts in fiscal year 2000. In addition, 81 percent of the states and transit authorities indicated that they could not provide information on the personal net worth of the owners of DBEs that were not awarded prime contracts in fiscal year 2000. Seventy-eight percent of the states and transit authorities indicated that they could not provide information on the personal net worth

of the owners of DBEs that were not awarded subcontracts in fiscal year 2000. Similar to the information on a firm's annual gross receipts, personal net worth information is required to determine a firm's eligibility for the program but is not reported to USDOT. Since this eligibility requirement was introduced in the new regulations, states and transit authorities are just starting to collect this information.[31] Over 60 percent of the states and transit authorities indicated that they could not provide this information because it is not electronically maintained and therefore would be difficult and time-consuming to compile and report.

The information that was provided from a limited number of states and transit authorities indicates that over half of the DBEs that received prime and subcontracts in fiscal year 2000 had owners whose personal net worth was less than $250,000. Additionally, the data indicate that the personal net worth of the owners of DBEs receiving prime contracts was higher than the personal net worth of the owners of DBEs receiving subcontracts. However, because this information is based on the responses of a small percentage of all states and

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[31] According to the regulations, firms applying to the DBE program must provide a signed and notarized statement of personal net worth from the individuals whose net worth is used to determine the firms' DBE eligibility. Firms that were participating in the program before the effective date of the new regulations (Mar. 1999) would have to submit the information the next time they applied for recertification, which occurs every 3 years. Hence, information on personal net worth may not be collected from all DBEs until fiscal year 2002.

transit authorities, it may not be representative and therefore should not be generalized to the entire DBE community. (For more detailed information see app. II.)

Lack of Data Prevents a Financial Profile of Non-DBEs

Currently, the financial status of DBEs cannot be compared with that of the transportation contracting community as a whole because most states and transit authorities do not collect or maintain financial information on non-DBEs. For instance, over 90 percent of the states and transit authorities responding to our survey could not provide information on the annual gross receipts of non-DBEs. The primary reason for not being able to report the information was not having it in an electronic database. The new regulations require states and transit authorities to collect information on the annual gross receipts of the non-DBEs that bid on their USDOT-assisted contracts. This information is to be included in the states' and transit authorities' bidders lists. According to USDOT, states and transit authorities have expressed concern about their ability to collect this information because non-DBEs have been reluctant to share this information.

No survey respondent could provide information on the personal net worth of the owners of non-DBEs that were awarded prime or subcontracts in fiscal year 2000. The majority of the states and transit authorities (61 percent) indicated that they do not currently collect this information or plan to do so in the future. Only 8 percent reported that they plan to collect this information in the future. States and transit authorities are not required to

collect information on the personal net worth of the owners of non-DBEs.

Information on Discrimination and Other Barriers That May Limit DBEs

There are numerous sources that could contain information relevant to whether discrimination limits the ability of DBEs to compete for USDOT-assisted contracts, including studies of lending, bonding, and business practices affecting the formation and competition of minority firms; state and local disparity studies; discrimination complaints; and relevant court cases. We focused our review on court cases involving the federal DBE program since the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena*, transportation-specific disparity studies published between 1996 and 2000; and written complaints of discrimination filed by DBEs with states, transit authorities, and USDOT. We focused on these sources because they are directly related to transportation contracting and the federal DBE program. However, we did not address whether the DBE program satisfies the requirements of strict scrutiny and is therefore constitutional. In our review, we found the following:

- The courts that have considered the constitutionality of the federal DBE program under the standard articulated in the Supreme Court's 1995 decision in the *Adarand* case have concluded that discrimination adversely affects DBEs.
- All 14 studies we reviewed found that there were disparities between the availability and utilization of minority- and women-owned

business enterprises (MBE/WBEs) in transportation contracts.[32] Taken as a whole, these studies suggest that disparities exist. However, none provide reliable evidence of disparity because the limited data used to calculate disparities, compounded by methodological weaknesses, create significant uncertainties about the studies' findings – that is, they could result in either an overstatement or an understatement of MBE/WBEs' availability and utilization.

- USDOT does not systematically track information on the discrimination complaints filed by DBEs – information that could shed light on the existence of discrimination against DBEs.

In addition, a number of factors are often cited by agency officials and representatives from both industry and minority associations as limiting DBEs' ability to compete for contracts. These factors include a lack of working capital and limited access to bonding. However, there was little agreement among the officials we contacted about whether these factors are attributable to discrimination or are barriers that all small businesses face.

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[32] Two studies did not have enough data to perform a statistically valid disparity ratio analysis of transportation-specific contracts, and instead conducted disparity analyses of contracts awarded by several agencies including the transportation agencies. Several studies analyzed disparity separately within sub-groups of MBE/WBEs. Disparity was found in at least one subgroup, but not in all of them.

Courts Have Found Sufficient Evidence of Discrimination to Justify the Federal DBE Program

In order to uphold a program, such as the federal DBE program, that uses race or ethnicity as a criterion for decision-making, a court must find sufficient evidence of discrimination to conclude that the program serves a compelling governmental interest. Therefore, cases considering the constitutionality of the federal DBE program can indicate whether discrimination adversely affects DBEs' participation in transportation contracting. The courts that have addressed the DBE program under the standard articulated by the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena* (discussed on page 13 of this report) have found that the evidence of discrimination presented was sufficient for them to conclude that the program serves a compelling governmental interest, specifically, remedying the effects of discrimination against DBEs.[33]

Most recently, in its review of the DBE program in *Adarand*, the Tenth Circuit Court of Appeals concluded

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[33] Several additional challenges to the constitutionality of the DBE program are in various stages of litigation. In addition, in 1996, a district court in Texas concluded that the DBE program of the Metropolitan Transit Authority of Harris County was unconstitutional and called into question the constitutionality of the federal DBE program as well. See *Houston Contractors Ass'n v. Metropolitan Transit Authority of Harris County*, 993 F. Supp. 545 (S.D. Tex. 1997). The court did not, however, assess whether the programs served a compelling governmental interest. The Fifth Circuit Court of Appeals set aside the district court's decision and sent the case back to the district court for further review.

that discrimination adversely affects both the formation of qualified minority subcontracting businesses and their ability to successfully compete for highway construction subcontracts.[34] On the basis of the evidence presented,[35] the court found that discrimination by prime contractors, unions, and lenders impedes the formation of qualified minority businesses in the subcontracting market nationwide. The court also acknowledged the causal link between the availability of capital and the ability to implement public works construction projects and found

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[34] As discussed earlier, the Tenth Circuit Court of Appeals reversed a 1997 district court decision finding that the subcontracting compensation clause and DBE provision were unconstitutional. The district court had found that the programs at issue served a compelling interest, but were not narrowly tailored. The district court's findings regarding discrimination were adopted by another district court addressing a constitutional challenge to the DBE provision, the Department of Transportation's implementing regulations, and the state of Minnesota's federal DBE program. In that case, the district court found that the DBE program satisfied the first element of strict scrutiny on the basis of the district court's 1997 decision in *Adarand*. However, as in *Adarand*, the court concluded that the program was not narrowly tailored to serve the identified compelling interest. See *In re: Sherbrooke Sodding*, 17 F. Supp. 2d 1026 (D. Minn. 1998).

[35] Throughout its decision, the court referred to the congressional investigations, hearings, statistical and anecdotal evidence, and other studies cited in a 1996 Department of Justice review entitled "The Compelling Interest for Affirmative Action in Federal Procurement," 61 Fed. Reg. 26050 (1996). As a preliminary matter, the court found that the federal government need not be as geographically limited as states and local governments in remedying the effects of discrimination in markets created by the disbursement of federal funds.

that the studies cited by the government strongly supported a finding of discrimination in lending. For example, it cited a survey of 407 business owners in the Denver area that found significant differences in the loan denial rate for white, African-American, and Hispanic business owners, even after controlling for other factors like size and net worth.

The court also addressed barriers to competition by existing minority businesses. Citing congressional hearings and statistical evidence, among other things, the court found that minority businesses are often excluded by business networks of prime and subcontractors from opportunities to bid on construction projects. The court also discussed bonding requirements, finding another barrier to competition. For example, it cited a Louisiana study finding that minority firms were nearly twice as likely to be rejected for bonding; three times more likely to be rejected for bonding in amounts over $1 million; and, on average, charged higher rates for the same bonding policies than white firms with the same experience. Similarly, the court accepted evidence of suppliers' withholding price discounts from minority subcontractors, thus driving up their bids. In light of this evidence, the court rejected Adarand Constructors' argument that minority businesses face the same problems as all new businesses, regardless of the race of the owners.

Finally, the court considered disparity studies conducted by state and local governments.[36] In doing so, the court

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[36] Although states and local governments do not conduct disparity studies to justify the federal DBE program, the

accepted the government's finding, based on a review of disparity studies, that minority construction subcontracting firms received 87 cents for every dollar that they would be expected to receive given their availability. The court also acknowledged the potential for weaknesses in the data and methodology used in disparity studies and stated that particular evidence undermining the reliability of specific studies would be relevant to a determination regarding discrimination. However, it noted that Adarand Constructors had not provided it with evidence undermining the studies' reliability.[37] Furthermore, the court found that Adarand Constructors had failed to introduce credible, specific evidence to refute the government's showing of a compelling interest.[38] As a result, it held that there was sufficient evidence of discrimination

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Department of Justice review stated that disparity studies conducted by states and local governments throughout the country in connection with their own programs are of particular relevance to affirmative action measures in federal programs providing grants to such entities.

[37] The court acknowledged the need for studies to take into account the special qualifications needed to undertake the task at issue. However, the court stated that it was unaware of such qualifications, aside from the general qualifications necessary to operate a construction contracting business, and that the record was without evidence that the subcontractors who had been utilized had performed inadequately or otherwise demonstrated a lack of necessary qualifications.

[38] The court also "[took] notice" of evidence of the link between the discontinuance of a race-conscious program and minority business participation in the relevant market. The court stated that this evidence supported the claim of discriminatory barriers to participation by minority contractors.

to justify the use of racial and ethnic criteria in transportation contracting.

Data and Methodological Weaknesses Limit the Findings of Transportation-Specific Disparity Studies

Fourteen recent, transportation-specific disparity studies[39] concluded that disparities existed between the utilization of MBE/WBEs in transportation contracts and availability of these firms in the marketplace.[40]

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[39] We defined recent, transportation-specific disparity studies as studies published between 1996 and 2000 containing a separate disparity analysis on transportation contracting.

[40] We chose to review transportation-specific disparity studies published between 1996 and 2000, in part, because the new DBE regulations recommend that any disparity study relied on in the DBE goal-setting process should be as recent as possible and focused on the transportation contracting industry. We reviewed two additional transportation-specific studies published between 1996 and 2000 that examined minority- and women-owned business procurement. One of these studies did not use a traditional disparity ratio and thus is not included in our discussion. However, we did review the study and found that it contained methodological weaknesses that create uncertainties about its findings. The other study was considered a work in progress and thus was not included in our discussion. Both of these studies used new approaches to identify barriers to full and active MBE/WBE participation. For example, one study disaggregated the procurement process into discrete components to determine if any individual procurement practice negatively affects MBE/WBEs. USDOT has not conducted any disparity studies or any other type of analysis examining discrimination in federal transportation contracting because it believes such studies or analyses are not needed to justify the federal DBE program.

Numerous state and local governments have used disparity studies to support their minority contracting programs and in setting their federal DBE goals. For example, about 30 percent of the states and transit authorities we surveyed reported that they used a disparity study to help set their fiscal year 2000 DBE participation goals. However, our review of the 14 disparity studies found that the limited data used to calculate disparities, compounded by methodological weaknesses, create uncertainties about the studies' findings.[41] Rather than discuss the limitations of each study specifically, we have chosen to discuss some of the more common problems we found. While not all studies suffered from every problem, each suffered from enough problems to make its findings questionable. We recognize that there are difficulties inherent in conducting disparity studies and that such limitations are common to social science research; however, the disparity studies we reviewed did not sufficiently address such problems or disclose their limitations. It is not clear what conclusions a court would draw about the studies' findings.

The studies we reviewed relied on a disparity ratio – that is, a comparison of the availability of MBE/WBEs to their utilization in contracts – as an indicator of discrimination. However, the data necessary to properly calculate such

[41] Because our review of transportation-specific disparity studies was limited, our conclusions cannot be generalized to disparity studies as a whole. Moreover, the findings in any disparity study would be limited to the geographical scope of that particular study.

ratios – complete and accurate lists of MBE/WBEs' availability and utilization – are often lacking. An availability list should include all qualified, willing, and able firms in the relevant market area, grouped by industry subspecialties and by MBE/WBE or non-MBE/WBE status. A utiiization list should include all firms in the relevant market area that were awarded prime and subcontracts, grouped by industry subspecialty and MBE/WBE or non-MBE/WBE status. Because these data are often lacking, some proxies (i.e., substitute information) have been used to calculate disparity ratios.

To develop proxies of availability, the disparity studies we reviewed used sources including Census Bureau data, directories or other listings of firms, prequalification lists,[42] and/or bidders lists. These could be useful data sources. However, all of these data sources have shortcomings, whether used separately or in combination, that must be taken into account when using them as proxies for availability. Such shortcomings would result in availability lists that could either under- or overstate the number of firms available for transportation contracting. The limitations of using these data sources as proxies for availability include the following:

- Census Bureau data cannot adequately indicate whether a firm is truly available, that is, whether it has the qualifications, willingness, or ability to complete contracts. However, in using Census Bureau data, the studies

[42] A prequalification list, sometimes referred to as a precertification list, includes all firms that have been prequalified by states or transit authorities to compete for contracts.

depicted all operational firms as available for contracting. Some studies attempted to account for the qualifications of firms by including only firms in the relevant two-digit Standard Industry Classification (SIC) codes in their availability lists.[43] Using a finer degree of distinction (e.g., classification by the four-digit SIC code level) would help to ensure that firms are similar enough for comparison. For example, some studies used the two-digit SIC code for heavy construction, a category that includes firms as diverse as general contractors for highway construction and general contractors for radio tower construction.

- Directories and other listings do not contain information on firms' qualifications, willingness, or abilities. This could result in an overstatement of how many firms are available for transportation contracting. In addition, some of the data obtained from directories and listings were inaccurate. For example, some of the disparity studies we reviewed indicated that as many as 16 percent of the firms included in the directories and listings were unreachable because of such problems as disconnected telephones, wrong telephone numbers, incorrect addresses, or dissolution of the firms.

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[43] SIC codes are used to identify companies by their primary business activity. The activity is determined by the major product produced or service rendered. The coding system consists of major industries that are further divided into a multitude of minor groups identified by a four-digit SIC code.

- Prequalification and bidders lists may be better sources of availability than Census Bureau data or directories because they better approximate firms' qualifications, willingness, and ability to compete for contracts. However, the mechanisms used by states and transit authorities to compile them may limit their reliability. In the studies we reviewed, we found four problems. First, some studies we reviewed used bidders and prequalification lists that were updated infrequently or had no mechanism to ensure that firms no longer available were removed from the list. For example, one study used a list that never removed firms, increasing the risk that it contained firms no longer in business in the relevant market area. Second, some studies we reviewed used bidders or prequalification lists that were maintained for multiple city agencies, ranging from school districts to port authorities. Businesses qualified to perform school district work may not be qualified to perform port authority work. Third, the lists grouped all potential firms together, failing to take into account their industry subspecialty and capacity. Because of these problems, availability lists based on this information would overstate the number of firms that were qualified, willing, and able to perform transportation contracts. Finally, prequalification and bidders lists could under represent capable firms. Firms may refrain from participating because of perceived or actual barriers. For example, one study we reviewed surveyed firms and found that only 22 percent of those firms that expressed an interest in contracting with the

transit agency had actually attempted to obtain such work in the past.

The disparity studies we reviewed made few efforts to mitigate the problems with using these data sources as proxies for availability, nor did they disclose the limitations of their use. For example, the disparity studies did not sufficiently account for the lack of information on firms' qualifications when the availability lists were developed. One aspect of a firm's qualifications is its capability to handle transportation contracting. Some studies used average yearly revenue as a proxy for capability.

However, revenue does not adequately explain the differences in firms' capability. For example, two firms could have similar yearly revenues, but one firm might have performed 100 small contracts throughout the year because it did not have the capacity to perform large contracts, whereas the second firm might have performed two very large contracts. If revenue were used as a proxy for capability, these two firms would be considered equivalent.

In addition to determining the availability of firms, disparity studies must measure the utilization of MBE/WBEs to determine if disparities in contracting exist. This requires an analysis of both the number and dollar amount of contracts awarded to MBE/WBEs and non-MBE/WBEs. Such measurement is difficult because some states and transit authorities have incomplete records of the prime and subcontracts they have awarded. For example, several studies we reviewed did not include any analyses of subcontracting and therefore may understate

the utilization of firms. Because MBE/WBEs are more likely to be awarded subcontracts than prime contracts, MBE/WBEs in particular may appear underutilized when the focus remains on prime contractor data. Furthermore, although some studies did include calculations based on the number of contracts, all but two based their determination of disparities on only the dollar amounts of contracts. Because MBE/WBEs tend to be smaller than non-MBE/WBEs, they are often unable to perform larger contracts. Therefore, it would appear that they were awarded a disproportionately smaller amount of contract dollars. A more complete indicator of utilization would consider both the dollar amount and the number of contracts awarded or to control for differences in contract dollar amounts.

USDOT Has Not Provided Criteria for Reliability of Disparity Studies Used to Set DBE Goals

In March 2001, USDOT advised states and transit authorities that disparity studies used to set their DBE participation goals should be reliable. While pointing out that all or part of a disparity study pertaining to a local market area could provide a rich source of information for the goal-setting process, USDOT did not explain how states and transit authorities could evaluate the reliability of such studies. USDOT's guidance does not, for instance, caution against using studies that contain the types of data and methodological problems that we identified above. Without explicit guidance on what makes a disparity study reliable, states and transit authorities risk using studies that may not provide accurate information in setting their DBE goals.

Data on Written Discrimination Complaints Are Inconclusive

USDOT receives written complaints of discrimination from DBEs but does not systematically track or analyze information on these complaints.[44] As a result, this information is not readily available to shed light on the absence or presence of discrimination against DBEs. USDOT could not provide the total number of written complaints filed by DBEs for two reasons. First, while USDOT's Office of Civil Rights (DOCR) records the complaints and assigns identification numbers before routing them to FTA or FHWA for investigation, DOCR's records may not include complaints filed directly with those agencies. Second, DBEs may file complaints of discrimination under the DBE regulations or regulations issued under title VI of the Civil Rights Act of 1964; however, DOCR does not record which title VI complaints are filed by DBEs. Similarly, FTA does not separately track the title VI complaints filed by DBEs. Because of these two problems, information provided by USDOT would likely understate the number of complaints of discrimination filed by DBEs.

In addition, USDOT could not provide the total number of investigations launched as a result of the written discrimination complaints filed by DBEs or information on the outcomes of these investigations. In order to determine whether the discrimination complaints filed by DBEs have merit, the number of investigations launched and the outcomes of the investigations are critical pieces

[44] We did not review USDOT's response to individual written complaints of discrimination.

of information. USDOT officials stated they do not track the number of investigations of written discrimination complaints filed by DBEs or the number of times discrimination was found through their investigations. To gather this type of information, USDOT officials stated one would need to go through each case file individually – nearly 100 over the last several years, not including title VI complaints.

We also asked the states and transit authorities we surveyed about written discrimination complaints filed by DBEs in fiscal years 1999 and 2000. Eighty-one percent of the respondents reported that they had not received any written discrimination complaints filed by DBEs during this period. Nineteen percent of the states and transit authorities reported that they had received a total of 31 written discrimination complaints filed by DBEs in 1999 and 2000. Of the 31 complaints filed, 29 had been investigated. Four of these investigations resulted in findings of discrimination. While the number of complaints filed by DBEs with states and transit authorities may seem low, it is important to note that DBEs that believe they have been the victims of discrimination have several options and may have elected to pursue action elsewhere. For example, a DBE could file a complaint with the responsible state or transit authority, USDOT, and/or the courts. In addition, USDOT officials stated that the number of written discrimination complaints filed (at any level) probably understates the level of discrimination for two reasons. Specifically, DBEs may choose not to file complaints because they believe the process is too time-consuming or burdensome or because they fear retribution (i.e., they would be denied future work).

Other Barriers May Limit DBEs' Ability to Compete for Contracts

Other factors may also limit the ability of DBEs to compete for USDOT-assisted contracts. However, there was little agreement among the officials we spoke with as to whether these factors are due to discrimination or the nature of small businesses. According to our survey results, 80 percent of the states and transit authorities responding had not conducted any type of analysis on this subject.[45] In addition, neither USDOT, nor SBA, nor the industry groups we contacted had conducted any type of study on factors that may limit the ability of DBEs to obtain contracts.[46] The industry officials we spoke with often cited such factors as contract bundling; limited access to bonding, working capital, and credit; and prequalification requirements.

The most common factors cited as limiting DBEs' ability to compete for contracts are a lack of working capital and limited access to credit and bonding. For example, according to an association representing small minority-owned businesses, DBEs frequently lack the capital needed to finance jobs without drawing on credit and are denied credit because they lack sufficient cash flow. Since these factors are widely perceived as limiting the ability of DBEs to compete for contracts, USDOT has established

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[45] Eight of the 17 states and transit authorities that had conducted such analyses reported that the analyses were included in their disparity studies.

[46] The 1996 Department of Justice review contained information on these factors.

a number of services, including short-term lending and bonding assistance, to help overcome these barriers.

Another factor often cited as a barrier to DBEs' ability to compete for contracts is contract bundling. Contract bundling is the consolidation of two or more procurement requirements previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract.[47] The resulting contract is likely to be unsuitable for award to small businesses, such as DBEs, because of (1) the diversity, size, or specialized nature of the elements of the performance specified; (2) the aggregate dollar value of the anticipated award; (3) the geographic dispersion of contract performance sites; or (4) any combination of these three factors. USDOT officials stated that they believe contract bundling is one of the largest barriers for DBEs in competing for transportation contracts. GAO recently reported that there is limited government-wide data on the extent of contract bundling and its effect on small businesses.[48]

Prequalification requirements are also cited as a barrier for DBEs. Most states require that firms competing for prime contracts be prequalified, meaning they must prove to the state that they are capable of performing contracts. For example, firms must show that they have an adequate line of credit and are bonded. According to

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[47] A similar concept is contract consolidation. Contract consolidation occurs when agencies combine existing contracts into fewer contracts as a means of streamlining as well as reducing procurement and contract administration costs.

[48] *Small Businesses: Limited Information Available on Contract Bundling's Extent and Effects* (GAO/GGD-00-82, Mar. 31, 2000).

USDOT officials, these requirements can hurt DBEs because the firms may not have the working capital and access to credit required for prequalification.

Impact of the DBE Program

Several measures could be used to help determine the impact of the DBE program. TEA-21 directed us to analyze:

- the impact of the DBE program on costs, including the costs of administering the program;
- the impact of the DBE program on competition and the creation of jobs; and
- the impact of discontinuing federal or non-federal DBE programs on DBEs.

Impact of the DBE Program on Costs, Competition, and the Creation of Jobs

USDOT, states and transit authorities incur costs in implementing and administering the DBE program. USDOT estimates that it incurred about $6 million in costs (including salaries and training expenses) to administer the DBE program for highways and transit authorities in fiscal year 2000.[49] Sixty-nine percent of the states

[49] According to USDOT, the costs incurred in fiscal year 2000 are higher than typical because of the work associated with the new regulations, such as training and reviews of recipients' new programs and goal-setting methods. USDOT indicated that, during a typical year, it would incur about $3.5 million to administer the DBE program.

and transit authorities responding to our survey estimated that they incurred a total of about $44 million in costs, including certification costs, to administer the DBE program in fiscal year 2000. The costs incurred ranged from a high of $4.5 million to a low of about $10,000. In addition, 13 states and transit authorities incurred a total of about $250,000 in litigation costs in fiscal year 2000 that they attributed to the federal DBE program. Although it has been asserted that the DBE program increases the costs of contracting (referred to as additional construction costs), 99 percent of the states and transit authorities we surveyed had not conducted a study or analysis to determine whether the DBE program has an impact on their contract costs.[50] USDOT has also not conducted such an analysis.

Almost none of the states and transit authorities responding to our survey have analyzed the impact of the DBE program on competition and the creation of jobs. Nor has USDOT conducted this type of analysis. According to USDOT officials and representatives from transportation associations, the DBE program does not create jobs; rather it shifts jobs to individuals who might not receive the jobs otherwise. As USDOT officials noted, USDOT-assisted contracts will be let regardless of the DBE program, and the program encourages greater racial and gender diversity within transportation contracting.[51]

[50] The Dallas Area Rapid Transit (DART) reported that it is collecting information to determine the overall costs of unbundling larger contracts.

[51] We did not look at the make-up and number of employees that work for DBEs compared with non-DBEs.

However, there is less agreement about the effects of the program on competition. Officials from USDOT and a minority business group stated that the DBE program does not hurt competition, noting that the DBE program does not use quotas and that DBEs must compete with non-DBEs to receive USDOT-assisted contracts. Moreover, these officials commented that the DBE program enhances competition because it encourages greater participation by more firms. In contrast, representatives from transportation associations believe that the DBE program stifles competition in certain subcontracting areas (e.g., guardrail work) where there is an overconcentration of DBEs. Because of this overconcentration of DBEs, according to the transportation associations, non-DBEs do not have an opportunity to work in those fields. Although USDOT does not have data indicating that overconcentration is a serious, nationwide problem, the new regulations authorized states and transit authorities to remedy situations in which an overconcentration of DBEs is limiting non-DBEs' ability to compete for contracts, such as varying the use of contract goals in these areas.

Impact of Discontinuing Federal and Nonfederal DBE Programs

Limited data prevent a thorough assessment of the impact of suspending or repealing (discontinuing) federal or nonfederal DBE programs on DBEs' participation in transportation contracting. As evidence that the DBE program is needed, supporters often cite statistics on DBEs' participation in transportation contracting after minority- and women-owned business contracting programs are

discontinued. An example used during the congressional debate preceding the passage of TEA-21 was the effect of discontinuing the state of Michigan's minority business contracting program in 1989. According to evidence cited during the debate, within 9 months of the suspension, the proportion of state highway dollars awarded to minority-owned businesses had dropped from 5 percent to 0 percent, while the proportion of state highway dollars awarded to women-owned businesses had declined from about 10 percent to 1 percent. Moreover, these new low rates of participation in state transportation contracting by minority-and women-owned businesses were contrasted with these firms' participation rates in USDOT-assisted contracts, which were significantly higher.[52] USDOT has not conducted studies or analyses measuring the impact of discontinuing federal or nonfederal DBE programs.

Most states and transit authorities that participated in federal DBE programs or nonfederal minority business enterprise and women business enterprise (MBE/WBE) contracting programs that were discontinued could not provide data that would allow us to thoroughly evaluate the impact of that action. For example, we identified one state and one transit authority that had discontinued

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[52] Michigan could not provide us with minority- and women-owned business participation data in state highway contracting for the years immediately before and after it discontinued its program. Furthermore, Michigan officials stated that the analysis showing the decline that is often cited was a one-time-only analysis and that the analysis is no longer available. Consequently, we cannot verify the numbers cited during the debate.

their federal DBE programs as a result of a court order.[53] However, only the state could provide participation data that would allow us to evaluate the impact of discontinuing the federal DBE program. We also identified 10 states and transit authorities that had participated in nonfederal MBE/WBE programs that were discontinued prior to 2000.[54] Only one state could provide sufficient data for us to evaluate the impact of the action. Conversely, officials from six states and transit authorities, including Michigan, told us that participation data for minorities and women in state transportation contracting for the years immediately before and after the discontinuance of their nonfederal MBE/WBE programs were not available. In addition, few of the states and transit authorities could provide equivalent data on non-MBE/WBEs. This information is important to determine whether changes in MBE/WBEs' participation rates in state transportation contracting were similar to the changes in the participation rates of non-MBE/WBEs or unique to the MBE/WBE

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[53] In 1998, Minnesota's Department of Transportation (MNDOT) discontinued its federal DBE program when it was declared unconstitutional; however, MNDOT reinstituted its federal program under the new DBE regulations in 2000. The Metropolitan Transit Authority of Harris County in Houston discontinued its federal DBE program in 1996 when its constitutionality was called into question. In 1998, it established a race and gender-neutral small business program, which FTA approved as its federal DBE program.

[54] Two other transit authorities had participated in minority- and women-owned business contracting programs that were discontinued in 2000. We did not try to obtain information from these two transit authorities because not enough time has elapsed for us to evaluate the impact of this action.

community. Consequently, we could not evaluate the impact of discontinuing these programs.

Two states – Minnesota and Louisiana – were able to provide sufficient data to assess the impact of discontinuing a federal and nonfederal program, respectively. We measured DBEs' and MBE/WBEs' participation using two indicators – (1) the number of transportation contracts awarded and (2) the dollar amounts awarded through those contracts. The participation data from these states suggest that discontinuing these programs had a negative impact on DBEs' and MBE/WBEs' participation in transportation contracting. For example, in Minnesota, DBEs' participation in federal transportation contracting remained relatively stable from 1995 to 1998. However, after the discontinuance of Minnesota's federal DBE program in 1998, DBEs' participation in federal transportation contracting dramatically declined. (See fig. 2. [Figure 2 omitted in printing])

Similarly, the data provided by Louisiana indicate that MBE/WBEs' participation in transportation contracting declined after Louisiana's nonfederal program was discontinued. As shown in figure 3 [Figure 3 omitted in printing], MBE/WBEs' participation in state transportation contracting increased from 1992 to 1995. In 1996, the year the nonfederal program was discontinued, the participation rate of MBE/WBEs in state transportation contracting dropped and continued to decline over the next 4 years.[55] An official from Louisiana attributed the decline

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[55] We also obtained data on DBE participation in Louisiana's federal DBE program from 1995 to 2000. In our

in MBE/WBEs' participation in state transportation contracting to the removal of affirmative action requirements on state funded projects and the realization by contractors that efforts to include MBE/WBEs were no longer necessary.

Conclusions

The Congress identified and directed us to collect information that would shed light on the impact of the DBE program across the nation – including information on who benefits from the program, the financial status of the DBE community compared with that of the non-DBE community, and degree to which DBEs participate in transportation contracting. However, much of this information is not readily available from USDOT, states and transit authorities, and industry groups. Without this information it is impossible to define the universe of DBEs, compare them with the transportation contracting community as a whole or gain a clear understanding of the overall impact of the DBE program. In some cases, USDOT has mechanisms in place, such as its quarterly reporting requirement, that could be used to collect additional information, including the annual gross receipts of DBEs and non-DBEs as well as non-DBEs' participation in subcontracting. In other cases, new mechanisms to collect or process the information are needed such as a method for determining the total number of certified DBEs

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review of data on DBE and MBE/WBE participation in federally-assisted and state contracting, we did not observe a shift of MBE/WBEs to federally-assisted contracts after the Louisiana's MBE/WBE program was discontinued.

nationwide. USDOT could also do more to analyze the information that is currently collected. By not systematically tracking and evaluating the total number of discrimination complaints filed by DBEs, the number of investigations launched, and the outcomes of the investigations, USDOT misses an opportunity to obtain information that could be used to identify trends and problem areas that may need attention. USDOT could also identify ways to improve the effectiveness of its own policies and guidance to states and transit authorities, and ultimately DBEs, by collecting and analyzing the information that the Congress has identified. Such information would help USDOT contribute to an informed congressional debate on the impact of the DBE program in connection with its reauthorization in 2003 and more effectively administer the program.

USDOT could also look for ways to provide more guidance to the states and transit authorities that are implementing the DBE program. Specifically, USDOT's new regulations put a mechanism in place for setting DBE goals and identified Census Bureau data and DBE directories, bidders lists, and disparity studies as data sources that states and transit authorities could use in setting these goals. However, in our review of disparity studies, we identified problems with these data sources that should be avoided or mitigated to help ensure that goals set by states and transit authorities are based on the level of DBE participation expected in the absence of discrimination – specifically, a level consistent with the availability of ready, willing, and able DBEs in the relevant market. USDOT provided examples of how to set DBE goals in its regulations, but has issued minimal guidance

to the states and transit authorities on how to avoid the types of data and methodological problems we identified and ensure that the data sources used to set goals are as reliable as possible. USDOT could provide additional guidance to help states and transit authorities carry out the program.

Recommendations for Executive Action

To assist USDOT in administering the DBE program and to help inform the Congress about the impact of the program, we recommend that the Secretary of Transportation take the following steps:

- Develop and implement a method for states and transit authorities to assign unique identification numbers to DBEs so that the total number of DBEs certified nationwide can be determined.

- Amend the quarterly reporting requirements for states and transit authorities to include information on the annual gross receipts of DBEs and non-DBEs and the number and dollar amount of the subcontracts awarded to non-DBEs. This information could be used to gain a more complete understanding of the participation rate of DBEs in subcontracting and of their financial status compared with other transportation contracting firms. Furthermore, USDOT should compile, analyze, and publish (in aggregate format) the information collected in the quarterly reports.

- Compile and analyze data on written complaints of discrimination filed by DBEs with USDOT in order to

(1) determine trends in the number and types of complaints filed and (2) identify problem areas that require action.

- Periodically compile information on DBEs, through a survey or other appropriate mechanism, to better understand the types of programs needed to assist these firms.

To better assist states and transit authorities in implementing the DBE program and help ensure that DBE participation goals reflect the availability of ready, willing, and able DBEs in the relevant market, we recommend that the Secretary of Transportation provide specific guidance to states and transit authorities on strategies to mitigate the potential problems associated with using Census Bureau data and DBE directories, disparity studies, and bidders lists to set their DBE goals.

We recognize that the implementation of these recommendations may result in some additional costs for USDOT, states, and transit authorities. However, given existing data collection requirements and the benefits associated with these recommendations, we believe such costs are warranted.

Agency Comments and Our Evaluation

We provided USDOT with a draft of this report for review and comment. On May 1, 2001, the Assistant Secretary for Administration responded for USDOT. USDOT did not comment on our recommendations. Instead, USDOT offered comments to clarify the role of disparity studies in the DBE program, the evidentiary value of disparity studies, the need for states and transit authorities to use the best available data in DBE goal-setting, and the status of DBE and non-DBE participation

data. During recent meetings and discussions, USDOT provided similar comments, which we considered and incorporated where appropriate. Therefore, we believe that the majority of USDOT's comments are already reflected in the report. USDOT's comments and our responses are located in Appendix IV.

We conducted our review from August 2000 through April 2001 in accordance with generally accepted government auditing standards.

We are sending copies of this report to congressional committees with responsibilities for the activities discussed in this report; the Honorable Norman Y. Mineta, Secretary of Transportation; the Honorable Mitchell Daniels, Director of the Office of Management and Budget; Hiram Walker, Acting Deputy Administrator, Federal Transit Administration; and Vincent F. Schimmoller, Deputy Executive Director, Federal Highway Administration. We will make copies available to others upon request.

If you or your staff have any questions about this report, please call me at (202) 512-2834. Key contributors to this report are listed in appendix V.

Sincerely yours,

/s/ John H. Anderson, Jr.
John H. Anderson, Jr.
Managing Director, Physical Infrastructure Issues

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13 C.F.R. § 124.103 (2001) Who is socially disadvantaged?

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

(b) *Members of designated groups.* (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified

by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for 8(a) BD (AA/8(a)BD) for consideration.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(A) *Education.* SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channelled the individual into nonprofessional or non-business fields.

(C) *Business history.* SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(d) *Socially disadvantaged group inclusion.* (1) *General.* Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members

and without regard to their individual qualities, SBA will publish a notice in the Federal Register that it has received and is considering such a request, and that it will consider public comments.

(2) *Standards to be applied.* In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) *Procedure.* The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) *Decision.* In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in

paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the Federal Register. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

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13 C.F.R. § 124.104 (2001) Who is economically disadvantaged?

(a) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(b) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must describe it in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(c) *Factors to be considered.* In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses

and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. SBA will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that SBA compares include total assets, net sales, pre tax profit, sales/working capital ratio, and net worth.

(1) *Transfers within two years.* (i) Except as set forth in paragraph (c)(1)(ii) of this section, SBA will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the 8(a) BD program or within two years of a Participant's annual program review, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(ii) SBA will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(iii) In determining an individual's access to capital and credit, SBA may consider any assets that the individual transferred within such two-year period described by paragraph (c)(1)(i) of this section that SBA does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(2) *Net worth.* For initial 8(a) BD eligibility, the net worth of an individual claiming disadvantage must be less than $250,000. For continued 8(a) BD eligibility after admission to the program, net worth must be less than $750,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(i) A contingent liability does not reduce an individual's net worth.

(ii) The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land

received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

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13 C.F.R. § 124.1002 (2001) What is a Small Disadvantaged Business (SDB)?

(a) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. Qualified Private Certifiers must use the 8(a) criteria applicable to ownership and control in determining whether a particular firm is actually owned and controlled by one or more individuals claiming disadvantaged status.

(b) *SDB eligibility criteria.* A small disadvantaged business (SDB) is a concern:

(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit Standard Industrial Classification (SIC) code.

(i) For purposes of SDB certification, the applicable SIC code is that which relates to the primary business activity of the concern;

(ii) For purposes related to a specific Federal Government contract, the applicable SIC code is that assigned by the contracting officer to the procurement at issue;

(2) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals as set forth in § 124.105. For the requirements relating to tribes and ANCs, NHOs, or CDCs, *see* §§ 124.109, 124.110, and 124.111, respectively.

(3) Except for tribes, ANCs, NHOs, and CDCs, whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals. For the requirements relating to tribes and ANCs, NHOs, or CDCs, *see* §§ 124.109, 124.110, and 124.111, respectively.

(4) Which, for purposes of SDB procurement mechanisms authorized by 10 U.S.C. 2323 (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides) relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) *Disadvantaged status.* In assessing the personal financial condition of an individual claiming economic disadvantage, his or her net worth must be less than $750,000 after taking into account the exclusions set forth in § 124.104(c)(2).

(d) *Additional eligibility criteria.* Except for tribes, ANCs, CDCs and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

(e) *Potential for success not required.* The potential for success requirement set forth in § 124.107 does not apply as an eligibility requirement for an SDB.

(f) *Joint ventures.* Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides), provided that the requirements set forth in this paragraph are met.

(1) The disadvantaged participant(s) to the joint venture must have:

(i) Received an SDB certification from SBA; or

(ii) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application.

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible to be certified as an SDB. The entity created by such a relationship would not be owned and controlled by one or more socially and economically disadvantaged individuals. Each contract for which a joint venture submits an offer will be evaluated on a case by case basis.

(3) Except as set forth in 13 CFR 121.103(f)(3), a concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated with such other concern(s) for size purposes. If the exception does not apply, the combined annual receipts or

employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(4) An SDB must be the managing venturer of the joint venture, and an employee of the managing venturer must be the project manager responsible for performance of the contract.

(5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

(g) *Ownership restrictions for non-disadvantaged individuals.* The ownership restrictions set forth in § 124.105 (g) and (h) for non-disadvantaged individuals and concerns do not apply for purposes of determining SDB eligibility.

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13 C.F.R. § 124.1014 (2001) How long does an SDB certification last?

(a) Once SBA certifies a firm to be an SDB by placing it on the list of qualified SDBs, the firm will generally remain on the SBA-maintained list of certified SDBs for a period of three years from the date of its certification.

(1) A firm's SDB certification will extend beyond three years where SBA finds the firm to be an SDB:

(i) On the merits in connection with a particular protest (*see* § 124.1023(h)(2));

(ii) In connection with an SBA-initiated SDB determination (*see* § 124.1016(a)(2)); or

(iii) As part of an 8(a) BD annual review.

(2) Where SBA finds a firm not to be an SDB in connection with an SDB protest, an SBA-initiated SDB determination, or an 8(a) BD annual review, SBA will immediately decertify the firm as an SDB and remove it from the qualified list of SDBs.

(b) A firm that graduates from the 8(a) BD program will remain on the list of certified SDBs for a period of three years from the date of its last annual review.

(c) To remain on the SDB register after three years, a firm whose status as an SDB has not been upheld in connection with a protest or an SBA-initiated SDB determination, or has not been certified as an eligible 8(a) Participant as part of an annual review, must submit a new application and receive a new certification.

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48 C.F.R. § 19.000 (2000) Scope of part.

(a) This part implements the acquisition-related sections of the Small Business Act (15 U.S.C. 631, *et seq.*), applicable sections of the Armed Services Procurement Act (10 U.S.C. 2302, *et seq.*), the Federal Property and Administrative Services Act (41 U.S.C. 252), section 7102 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), 10 U.S.C. 2323, and Executive Order 12138, May 18, 1979. It covers –

(1) The determination that a concern is eligible for participation in the programs identified in this part:

(2) The respective roles of executive agencies and the Small Business Administration (SBA) in implementing the programs;

(3) Setting acquisitions aside for exclusive competitive participation by small business concerns and HUBZone small business concerns, and sole source awards to HUBZone small business concerns;

(4) The certificate of competency program;

(5) The subcontracting assistance program;

(6) The "8(a)" program, under which agencies contract with the SBA for goods or services to be furnished under a subcontract by a small disadvantaged business concern;

(7) The use of women-owned small business concerns;

(8) The use of a price evaluation adjustment for small disadvantaged business concerns, and the use of a price evaluation preference for HUBZone small business concerns;

(9) The Small Disadvantaged Business Participation Program;

(10) The Very Small Business Pilot Program; and

(11) The use of veteran-owned small business concerns and service-disabled veteran-owned small business concerns.

(b) This part, except for Subpart 19.6, applies only inside the United States, its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia. Subpart 19.6 applies worldwide.

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48 C.F.R. § 19.201 (2000) General policy.

(a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

(b) The Department of Commerce will determine on an annual basis, by North American Industry Classification System (NAICS) Industry Subsector, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms and applicable factors (percentages). The Department of Commerce determination shall only affect solicitations that are issued on or after the effective date of the determination. The effective date of the Department of Commerce determination shall be no

less than 60 days after its publication date. The Department of Commerce determination shall not affect ongoing acquisitions. The SDB procurement mechanisms are a price evaluation adjustment for SDB concerns (see Subpart 19.11), an evaluation factor or subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203). The Department of Commerce determination shall also include the applicable factors, by NAICS Industry Subsector, to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The General Services Administration shall post the Department of Commerce determination at http://www.arnet.gov/References/sdbadjustments.htm. The authorized procurement mechanisms shall be applied consistently with the policies and procedures in this subpart. The agencies shall apply the procurement mechanisms determined by the Department of Commerce. The Department of Commerce, in making its determination, is not limited to the SDB procurement mechanisms identified in this section where the Department of Commerce has found substantial and persuasive evidence of –

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.

(c) Heads of contracting activities are responsible for effectively implementing the small business programs within their activities, including achieving program goals. They are to ensure that contracting and technical

personnel maintain knowledge of small business program requirements and take all reasonable action to increase participation in their activities' contracting processes by these businesses.

(d) The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (see section (k) of the Small Business Act). Management of the office shall be the responsibility of an officer or employee of the agency who shall, in carrying out the purposes of the Act –

(1) Be known as the Director of Small and Disadvantaged Business Utilization;

(2) Be appointed by the agency head;

(3) Be responsible to and report directly to the agency head or the deputy to the agency head;

(4) Be responsible for the agency carrying out the functions and duties in sections 8, 15, and 31 of the Small Business Act.

(5) Work with the SBA procurement center representative to –

(i) Identify proposed solicitations that involve bundling;

(ii) Facilitate small business participation as contractors including small business contract teams, where appropriate; and

(iii) Facilitate small business participation as subcontractors and suppliers where participation by small business concerns as contractors is unlikely;

(6) Assist small business concerns in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions;

(7) Have supervisory authority over agency personnel to the extent that their functions and duties relate to sections 8, 15, and 31 of the Small Business Act.

(8) Assign a small business technical advisor to each contracting activity within the agency to which the SBA has assigned a representative (see 19.402) –

(i) Who shall be a full-time employee of the contracting activity, well qualified, technically trained, and familiar with the supplies or services contracted for by the activity; and

(ii) Whose principal duty is to assist the SBA's assigned representative in performing functions and duties relating to sections 8, 15, and 31 of the Small Business Act;

(9) Cooperate and consult on a regular basis with the SBA in carrying out the agency's functions and duties in sections 8, 15, and 31 of the Small Business Act;

(10) Make recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded under Subpart 19.5 as a small business set-aside, under Subpart 19.8 as a Section 8(a) award, or under Subpart 19.13 as a HUBZone set-aside.

(e) Small Business Specialists must be appointed and act in accordance with agency regulations.

(f)(1) Each agency shall designate, at levels it determines appropriate, personnel responsible for determining whether, in order to achieve the contracting agency's goal for SDB concerns, the use of the SDB mechanism in Subpart 19.11 has resulted in an undue burden on non-SDB firms in one of the Industry Subsectors and regions identified by Department of Commerce following paragraph (b) of this section, or is otherwise inappropriate. Determinations under this subpart are for the purpose of determining future acquisitions and shall not affect ongoing acquisitions. Requests for a determination, including supporting rationale, may be submitted to the agency designee. If the agency designee makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination in consultation with the Department of Commerce and the Small Business Administration. At a minimum, the following information should be included in any submittal:

(i) A determination of undue burden or other inappropriate effect, including proposed corrective action.

(ii) The Industry Subsector affected.

(iii) Supporting information to justify the determination, including, but not limited to, dollars and percentages of contracts awarded by the contracting activity under the affected Industry Subsector for the previous two fiscal years and current fiscal year to date for –

(A) Total awards;

(B) Total awards to SDB concerns;

(C) Awards to SDB concerns awarded contracts under the SDB price evaluation adjustment where the SDB concerns would not otherwise have been the successful offeror;

(D) Number of successful and unsuccessful SDB offerors; and

(E) Number of successful and unsuccessful non-SDB offerors.

(iv) A discussion of the pertinent findings, including any peculiarities related to the industry, regions or demographics.

(v) A discussion of other efforts the agency has undertaken to ensure equal opportunity for SDBs in contracting with the agency.

(2) After consultation with OFPP, or if the agency does not receive a response from OFPP within 90 days after notice is provided to OFPP, the contracting agency may limit the use of the SDB mechanism in Subpart 19.11 until the Department of Commerce determines the updated price evaluation adjustment, as required by this section. This limitation shall not apply to solicitations that already have been synopsized.

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48 C.F.R. § 19.702 (2000) Statutory requirements.

Any contractor receiving a contract for more than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(a) Except as stated in paragraph (b) of this section, Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:

(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, that individually is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bidding acquisitions, each invitation for bids to perform a contract or contract modification, that individually is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) of this section) are not required –

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; or

(4) For modifications to contracts within the general scope of the contract that do not contain the clause at 52.219-8, Utilization of Small Business Concerns (or equivalent prior clauses; *e.g.*, contracts awarded before the enactment of Public Law 95-507).

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

(d) As authorized by 15 U.S.C. 637(d)(11), certain costs incurred by a mentor firm in providing developmental assistance to a protégé firm under the Department of Defense Pilot Mentor-Protégé Program, may be credited as subcontract awards to a small disadvantaged business for the purpose of determining whether the mentor firm attains a small disadvantaged business goal under any subcontracting plan entered into with any executive agency. However, the mentor-protégé agreement must have been approved by the –

Office of Small and Disadvantaged Business
Utilization
Office of the Under Secretary of Defense
(Acquisition, Technology and Logistics)
1777 N. Kent Street
Suite 9100
Arlington, VA 22209

before developmental assistance costs may be credited against subcontracting goals. A list of approved agreements may be obtained at http://www.acq.osd.mil/sadbu/mentor_protege/ or by calling 1-800-553-1858.

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48 C.F.R. § 19.704 (2000) Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include –

(1) Separate percentage goals for using small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-

owned small business concerns as subcontractors. Service-disabled veteran-owned small business concerns meet the definition of veteran-owned small business concerns, and offerors may include them within the subcontracting plan goal for veteran-owned small business concerns. A separate goal for service-disabled veteran-owned small business concerns is not required;

(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of types planned for subcontracting to small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(4) A description of the method used to develop the subcontracting goals;

(5) A description of the method used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(7) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

(8) A description of the efforts the offeror will make to ensure that small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts;

(9) Assurances that the offeror will include the clause at 52.219-8, Utilization of Small Business Concerns (see 19.708(a)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $500,000 ($1,000,000 for construction) to adopted a plan that complies with the requirements of the clause at 52.219-9, Small Business Subcontracting Plan (see 19.708(b));

(10) Assurances that the offeror will –

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, following the instructions on the forms or as provided in agency regulations; and

(iv) Ensure that its subcontractors agree to submit SF 294 and SF 295; and

(11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master plan (see 19.701) that contains all the elements required by the clause at 52.219-9, Small Business Subcontracting Plan, except goals. Master plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master plans. Changes required to update master plans are not effective until approved by the contracting officer. A master plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(c) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by paragraph (a) of this section and shall contain separate statements and goals for the basic contract and for each option.

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The contractor shall –

(1) Submit the commercial plan to either the first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or, if the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period; and

(2) Submit a new commercial plan, 30 working days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. When a new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan.

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48 C.F.R. § 19.705-4 (2000) Reviewing the subcontracting plan.

The contracting officer must review the subcontracting plan for adequacy, ensuring that the required information, goals, and assurances are included (see 19.704).

(a) No detailed standards apply to every subcontracting plan. Instead, the contracting officer must consider each plan in terms of the circumstances of the particular acquisition, including –

(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions;

(2) Proven methods of involving small business concerns as subcontractors in similar acquisitions;

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) If, under a scaled bid solicitation, a bidder submits a plan that does not cover each of the 11 required elements (see 19.704), the contracting officer shall advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan that incorporates the required elements within the time allotted, the bidder shall be ineligible for award. If the plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small Business Concerns, the contracting officer may find the bidder nonresponsible.

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the 11 elements of the plan (see 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors to the maximum practicable extent. The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts. Additionally, particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program), may be used when additional and unique contract effort, such as providing technical assistance, could significantly increase subcontract awards to small business, veteran-owned small business, HUBZone small business, or women-owned small business concerns.

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) Obtain information available from the cognizant contract administration officer, as provided for in 19.706(a), and evaluate the offeror's past performance in

awarding subcontracts for the same or similar products or services to small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance and consider the performance of other contractors on similar efforts.

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to –

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(3) Ensure that the subcontracting goals are consistent with the offeror's cost or pricing data or information other than cost or pricing data.

(4) Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

(5) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the supplies or services to be subcontracted, the known availability of small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

(6) Advise the offeror of available sources of information on potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offeror's proposed goals are questionable, the contracting officer must emphasize that the information should be used to develop a realistic and acceptable goals. The contracting officer should ensure that the contractor has considered the use of service-disabled veteran-owned small businesses in developing its veteran-owned small business goal (see 19.704(a)(1) and 52.219-9(d)(1)).

(7) Obtain advise and recommendations from the SBA procurement center representative (if any) and the agency small business specialist.

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48 C.F.R. § 19.705-5 (2000) Awards involving subcontracting plans.

(a) In making an award that requires a subcontracting plan, the contracting officer shall be responsible for the following:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA resident procurement center representative of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice shall be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer. Failure of the representative to respond in a reasonable period of time shall not delay contract award.

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19.702(a)(1) and (2), shall contain at least a preliminary basic plan addressing the requirements of 19.704 and in such cases require the negotiation of the

final plan within 90 days after award or before definitization, whichever occurs first.

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48 C.F.R. § 19.705-7 (2000) Liquidated damages.

(a) Maximum practicable utilization of small business, veteran-owned small business (including service-disabled veteran-owned small business), HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

(c) If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly. If the contracting officer decides in accordance with paragraph (d) of this subsection that the

contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business, veteran-owned small business (including service-disabled veteran-owned small business), HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following, though not all inclusive, may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider

for contract award small business, veteran-owned small business (including service-disabled veteran-owned small business), HUBZone small business, small disadvantaged business, or women-owned small business concerns; a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms or as provided in agency regulations; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; or the adoption of company policies or procedures that have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

(f) With respect to commercial plans approved under the clause at 52.219-9, Small Business Subcontracting Plan, the contracting officer that approved the plan shall –

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, and document the results of the review;

(3) If a determination is made to assess liquidated damages, in order to calculate the assess the amount of damages, the contracting officer shall ask the contractor to provide –

(i) Contract numbers for the Government contracts subject to the plan;

(ii) The total Government sales during the contractor's fiscal year; and

(iii) The amount of payments made under the Government contracts subject to that plan that contributed to the contractor's total sales during the contractor's fiscal year; and

(4) When appropriate, assess liquidated damages on the Government's behalf, based on the pro rata share of subcontracting attributable to the Government contracts. For example: The contractor's total actual sales were $50 million and its actual subcontracting was $20 million. The Government's total payments under contracts subject to the plan contributing to the contractor's total sales were $5 million, which accounted for 10 percent of the contractor's total sales. Therefore, the pro rata share of subcontracting attributable to the Government contracts would be 10 percent of $20 million, or $2 million. To continue the example, if the contractor failed to

achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of $2 million, or $20,000. The contracting officer shall make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan.

(g) Liquidated damages shall be in addition to any other remedies that Government may have.

(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file a copy of the approved plan and a copy of the final decision assessing liquidating damages, if applicable.

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48 C.F.R. § 19.707 (2000) The Small Business Administration's role in carrying out the program.

(a) Under the program, the SBA may –

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans;

(2) Review (within 5 working days) any solicitation that meets the dollar threshold in 19.702(a)(1) or (2) before the solicitation is issued;

(3) Review (within 5 working days) before execution any negotiated contractual documents requiring a

subcontracting plan, including the plan itself, and submit recommendations to the contracting officer, which shall be advisory in nature; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to –

(1) Prescribe the extent to which any contractor or subcontractor shall subcontract,

(2) Specify concerns to which subcontracts will be awarded, or

(3) Exercise any authority regarding the administration of individual prime contracts or subcontracts.

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48 C.F.R. Subpart 19.11 (2000) – Price Evaluation Adjustment for Small Disadvantaged Business Concerns

19.1101 General.

A price evaluation adjustment for small disadvantaged business concerns shall be applied as determined by the Department of Commerce (sec 19.201(b)). Joint ventures may qualify provided the requirements set forth in 13 CFR 124.1002(f) are met.

19.1102 Applicability.

(a) Use the price evaluation adjustment in competitive acquisitions in the authorized NAICS Industry Subsector.

(b) Do not use the price evaluation adjustment in acquisitions –

(1) That are less than or equal to the simplified acquisition threshold;

(2) That are awarded pursuant to the 8(a) Program;

(3) That are set aside for small business concerns;

(4) That are set aside for HUBZone small business concerns;

(5) Where price is not a selection factor so that a price evaluation adjustment would not be considered (*e.g.*, architect/engineer acquisitions); or

(6) Where all fair and reasonable offers are accepted (*e.g.*, the award of multiple award schedule contracts).

19.1103 Procedures

(a) Give offers from small disadvantaged business concerns a price evaluation adjustment by adding the factor determined by the Department of Commerce to all offers, except –

(1) Offers from small disadvantaged business concerns that have not waived the evaluation adjustment;

or, if a price evaluation adjustment for small disadvantaged business concerns is authorized on a regional basis, offers from small disadvantaged business concerns, whose address is in such a region, that have not waived the evaluation adjustment;

(2) An otherwise successful offer of eligible products under the Trade Agreements Act when the acquisition equals or exceeds the dollar threshold in 25.403;

(3) An otherwise successful offer where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government;

(4) For DoD, NASA, and Coast Guard acquisitions, an otherwise successful offer from a historically black college or university or minority institution; or

(5) For DoD acquisitions, an otherwise successful offer of qualifying country end products (see DFARS 225.000-70 and 252.225-7001).

(b) Apply the factor to a line item or a group of line items on which award may be made. Add other evaluation factors such as transportation costs or rent-free use of Government facilities to the offers before applying the price evaluation adjustment.

(c) Do not evaluate offers using the price evaluation adjustment when it would cause award, as a result of this adjustment, to be made at a price that exceeds fair market price by more than the factor as determined by the Department of Commerce (see 19.202-6(a)).

19.1104 Contract clause.

Insert the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, in solicitations and contracts when the circumstances in 19.1101 and 19.1102 apply. If a price evaluation adjustment is authorized on a regional basis, the clause shall be included in the solicitation even if the place of performance is outside an authorized region. The contracting officer shall insert the authorized price evaluation adjustment factor. The clause shall be used with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation. The clause shall be used with its Alternate II when a price evaluation adjustment is authorized on a regional basis.

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48 C.F.R. § 19.1202 (2000) Evaluation factor or subfactor.

19.1202-1 General.

The extent of participation of SDB concerns in performance of the contract, in the NAICS Industry Subsector as determined by the Department of Commerce, and to the extent authorized by law, shall be evaluated consistent with this section. Participation in performance of the contract includes joint ventures, teaming arrangements, and subcontracts. Credit under the evaluation factor or subfactor is not available to SDB concerns that receive a price evaluation adjustment under Subpart 19.11. If an SDB concern waives the price evaluation adjustment at

Subpart 19.11, participation in performance of that contract includes the work expected to be performed by the SDB concern at the prime contract level.

19.1202-2 Applicability.

(a) Except as provided in paragraph (b) of this subsection, the extent of participation of SDB concerns in performance of the contract in the authorized NAICS Industry Subsector shall be evaluated in competitive, negotiated acquisitions expected to exceed $500,000 ($1,000,000 for construction).

(b) The extent of participation of SDB concerns in performance of the contract in the authorized NAICS Industry Subsector (see paragraph (a) of this subsection) shall not be evaluated in –

(1) Small business set-asides (see Subpart 19.5) and HUBZone set-asides (see Subpart 19.13);

(2) 8(a) acquisitions (see Subpart 19.8);

(3) Negotiated acquisitions where the lowest price technically acceptable source selection process is used (see 15.101-2); or

(4) Contract actions that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

19.1202-3 Considerations in developing an evaluation factor or subfactor.

In developing an SDB participation evaluation factor or subfactor for the solicitation, agencies may consider –

(a) The extent to which SDB concerns are specifically identified;

(b) The extent of commitment to use SDB concerns (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones);

(c) The complexity and variety of the work SDB concerns are to perform;

(d) The realism of the proposal;

(e) Past performance of offerors in complying with subcontracting plan goals for SDB concerns and monetary targets for SDB participation; and

(f) The extent of participation of SDB concerns in terms of the value of the total acquisition.

19.1202-4 Procedures.

(a) The solicitation shall describe the SDB participation evaluation factor or subfactor. The solicitation shall require offerors to provide, with their offers, targets, expressed as dollars and percentages of total contract value, in each of the applicable, authorized NAICS Industry Subsector, and a total target for SDB participation by the contractor, including joint venture partners, and team members, and a total target for SDB participation by subcontractors. The solicitation shall require an SDB offeror that waives the SDB price evaluation adjustment

in the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, to provide with its offer a target for the work that it intends to perform as the prime contractor. The solicitation shall state that any targets will be incorporated into and become part of any resulting contract. Contractors with SDB participation targets shall be required to report SDB participation.

(b) When an evaluation includes an SDB participation evaluation factor or subfactor that considers the extent to which SDB concerns are specifically identified, the SDB concerns considered in the evaluation shall be listed in the contract, and the contractor shall be required to notify the contracting officer of any substitutions of firms that are not SDB concerns.

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48 C.F.R. § 19.1203 (2000) Incentive subcontracting with small disadvantaged business concerns

The contracting officer may encourage increased subcontracting opportunities in the NAICS Industry Subsector as determined by the Department of Commerce for SDB concerns in negotiated acquisitions by providing monetary incentives (see the clause at 52.219-26, Small Disadvantaged Business Participation Program – Incentive Subcontracting, and 19.1204(c)). Monetary incentives shall be based on actual achievement as compared to proposed monetary targets for SDB subcontracting. The incentive subcontracting program is separate and distinct

from the establishment, monitoring, and enforcement of SDB subcontracting goals in a subcontracting plan.

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48 C.F.R. 19.1204 (2000) Solicitation provisions and contract clauses.

(a) The contracting officer may insert a provision substantially the same as the provision at 52.219-24, Small Disadvantaged Business Participation Program – Targets, in solicitations that consider the extent of participation of SDB concerns in performance of the contract. The contracting officer may vary the terms of this provision consistent with the policies in 19.1202-4.

(b) The contracting officer shall insert the clause at 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting, in solicitations and contracts that consider the extent of participation of SDB concerns in performance of the contract.

(c) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts containing the clause at 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting, a clause substantially the same as the clause at 52.219-26, Small Disadvantaged Business Participation Program – Incentive Subcontracting, when authorized (see 19.1203). The contracting officer may include an award fee provision in lieu of the incentive; in such cases,

however, the contracting officer shall not use the clause at 52.219-26.

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48 C.F.R. § 52.219-26 (1999) Small Disadvantaged Business Participation Program – Incentive Subcontracting.

As prescribed in 19.1204(c), insert a clause substantially the same as the following:

SMALL DISADVANTAGED BUSINESS PARTICIPATION PROGRAM – INCENTIVE SUBCONTRACTING (JAN 1999)

(a) Of the total dollars it plans to spend under subcontracts, the Contractor has committed itself in its offer to try to award a certain amount to small disadvantaged business concerns in the Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce.

(b) If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized SIC Major Groups, it will receive _____ [*Contracting Officer to insert the appropriate number between 0 and 10*] percent of the dollars in excess of the monetary target, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (*e.g.*, a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the offer, or the excess was caused by the award of subcontracts that had been planned but had not been disclosed in the offer during contract negotiations). Determinations made under this paragraph are not subject to the Disputes clause of this contract.

(c) If this is a cost-plus-fixed-fee contract, the sum of the fixed fee and the incentive fee earned under this contract may not exceed the limitations in subsection 15.404-4 of the Federal Acquisition Regulation.

(End of clause)

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49 C.F.R. § 26.1 (2000) What are the objectives of this part?

This part seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;

(b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;

(c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

(e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;

(f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and

(g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

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49 C.F.R. § 26.3 (2000) To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the

Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

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49 C.F.R. § 26.5 (2000) What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identify of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together

in determining whether a concern meets small business size criteria and the statutory cap on the participation of forms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut Blood, or a Combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

Compliance means that a recipient has correctly implemented the requirements of this part.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or sub-contract (at any tier), in a DOT-assisted highway, transit, or airport program.

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal

Transmit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or *DBE* means a for-profit small business concern –

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daugther, brother, sister, grandmother, grandfather, grandson, granddaugther, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is

recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or *OA* means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administartor" of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

Primary Recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient

will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or *SBA* means the United States Small Business Administration.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that

also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is –

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origin are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malasa, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States or Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangledesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

[64 FR 5126. Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999]

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49 C.F.R. § 26.7 (2000) What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

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49 C.F.R. § 26.51 (2000) What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts

to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of

DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

Example to Paragraph (f)(1): Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will

exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to Paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to Paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to [illegible] percent) and set contract goals accordingly during the year. If in Year III

you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

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49 C.F.R. § 26.61 (2000) How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

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49 C.F.R. § 26.63 (2000) What rules govern group membership determinations?

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

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49 C.F.R. § 26.67 (2000) What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of

personal net worth, with appropriate supporting documentation. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.

(ii) Notwithstanding any provision of state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. *Provided,* that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

(iii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $750,000, the individual is no longer eligible for participation in the

program and cannot regain eligibility by making an individual showing of disadvantage.

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your own certification proceeding, just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds $750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999]

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49 C.F.R. § 26.83 (2000) What procedures do recipients follow in making certification decisions?

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) *Uniform form.* [Reserved]

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions;

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or

(3) Require the applicant to go through your application process without regard to the action of the other recipient.

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about

which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

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49 C.F.R. § 26.87 (2000) What procedures does a recipient use to remove a DBE's eligibility?

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to

accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of

reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive. Including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the

retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendancy of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(i) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception*: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(j) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

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49 C.F.R. (2000)

APPENDIX E TO PART 26 – INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

The following guidance is adapted with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

SOCIAL DISADVANTAGE

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experience of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have

channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph 1.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities – especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments) – may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application

and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

ECONOMIC DISADVANTAGE

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will

also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period

described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

SUPREME COURT, U.S.
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No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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63 pp

QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions, statutes, and regulations involved	1
Statement	1
Summary of argument	17
Argument:	
I. Petitioner cannot prevail on its facial challenge and lacks standing to challenge the statutory and regulatory provisions it now purports to challenge	19
II. TEA-21 and the Secretary's DBE regulations are narrowly tailored to serve a compelling government interest	23
A. Congress has a compelling interest in eliminating discrimination and its effects on government spending and procurement	24
1. Congress had ample evidence of discrimination when it enacted TEA-21	25
2. Petitioner's objections to the evidence before Congress are unsubstantiated and insubstantial	32
3. Congress may condition spending to address nationwide problems affecting nationwide appropriations	35
B. DOT's DBE program is narrowly tailored	38
1. The DBE program seeks to channel remedial benefits to victims of discrimination	39

TABLE OF CONTENTS—Continued: Page

2. The DBE program permits race-conscious measures only where race-neutral corrections are insufficient 41
3. The DBE program is narrowly tailored through flexibility, proportionality, and durational limits 43
4. Congress's use of racial and ethnic presumptions is not fatally over-inclusive 45

Conclusion 50

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Peña*:
515 U.S. 200 (1995) ..... *passim*
16 F.3d 1537 (10th Cir. 1994), vacated, 515 U.S. 200 (1995) 11
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528 U.S. 216 (2000) 13
169 F.3d 1292 (10th Cir. 1999), rev'd, 528 U.S. 216 (2000) 13
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Concrete Works of Colo., Inc. v. *City & County of Denver*, 36 F.3d 1513 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995) 34
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Hagen v. *Utah*, 510 U.S. 399 (1994) 22
Interstate Traffic Control v. *Beverage*, 101 F. Supp. 2d 445 (S.D. W. Va. 2000) 40
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Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 22
Katzenbach v. *Morgan*, 384 U.S. 644 (1996) 38
Local No. 93, Int'l Ass'n of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986) 47
Lopez v. *Monterey County*, 525 U.S. 266 (1999) 38
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Cases—Continued: Page

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Oregon v. *Mitchell*, 400 U.S. 112 (1970) 35
Palmer v. *Shultz*, 815 F.2d 84 (D.C. Cir. 1987) 34
Sobel v. *Yeshiva Univ.*, 839 F.2d 18 (2d Cir. 1988), cert. denied, 490 U.S. 1105 (1989) 35
South Dakota v. *Dole*, 483 U.S. 203 (1987) 36
Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981) 34
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) 25
United States v. *Doe*, 465 U.S. 605 (1984) 25
United States v. *Enmons*, 410 U.S. 396 (1973) 32
United States v. *Morrison*, 529 U.S. 598 (2000) 36
United States v. *Paradise*, 480 U.S. 149 (1987) 16, 41, 44, 49
United States v. *Salerno*, 481 U.S. 739 (1987) 20
Valentino v. *United States Postal Serv.*, 674 F.2d 56 (D.C. Cir. 1982) 33
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 49

Constitution, statutes, and regulations:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Spending Clause) 1, 36
Cl. 3 (Commerce Clause) 36
Amend. V 1, 11
Due Process Clause 11
Amend. XIV 1, 11
§ 5 ..... 36, 46
Amend. XV:
§ 2 46

Statutes and regulations—Continued: Page

Act of Oct. 24, 1978, Pub. L. No. 95-507, § 201, 92 Stat. 1760 2
Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921 ..... 11, 12, 28
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Small Business Act, 15 U.S.C. 631 *et seq.* 1, 3
§ 2(f)(1), 15 U.S.C. 631(f)(1) 1-2, 23
§ 8(a)(5), 15 U.S.C. 637(a)(5) 4, 5, 39
§ 8(a)(6)(A), 15 U.S.C. 637(a)(6)(A) 4, 5, 39
§ 8(d)(1), 15 U.S.C. 637(d)(1) 8
§ 8(d)(3), 15 U.S.C. 637(d)(3) 19, 20
§ 8(d)(3)(C), 15 U.S.C. 637(d)(3)(C) 4
§ 8(d)(4), 15 U.S.C. 637(d)(4) 8, 21
§ 8(d)(4)-(6), 15 U.S.C. 637(d)(4)-(6) 7, 14, 21, 22
§ 8(d)(4)(B), 15 U.S.C. 637(d)(4)(B) 21
§ 8(d)(4)(E), 15 U.S.C. 637(d)(4)(E) 8
§ 8(d)(6), 15 U.S.C. 637(d)(6) 8
§ 8(d)(6)(A), 15 U.S.C. 637(d)(6)(A) 8
§ 8(d)(6)(C), 15 U.S.C. 637(d)(6)(C) 8
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§ 106(c), 101 Stat. 145 12
§ 106(c)(2)(B), 101 Stat. 146 ..... 11, 27
Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 ..... 11, 27
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Tit. I, § 1101(b)(2)(B), 112 Stat. 113 ..... 3, 4
Tit. I, § 1101(b)(4), 112 Stat. 114 5
Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended, 42 U.S.C. 1973 38
15 U.S.C. 694a 41
15 U.S.C. 694b 41

Statutes and Regulations—Continued:	Page
42 U.S.C. 1983	11
42 U.S.C. 2000d *et seq.*	11
13 C.F.R.:	
Section 124.103	8
Section 124.103(b)(1)	8
Section 124.103(b)(3)	8
Section 124.104(c)(2)	8
Section 124.1008(e)	8
Section 124.1008(e)(1)	8
Section 124.1008(e)(1)(ii)	8
Section 124.1017	8
48 C.F.R. Pt. 19	21
Section 19.201	9
Section 19.201(b)	9, 37
Section 19.202-1	10
Section 19.202-2	9
Section 19.702	8
Section 19.704	8
Section 19.705-7	8
49 C.F.R. Pt. 26	1, 2
Section 26.3	7
Section 26.15	7, 16, 45
Section 26.29	43
Section 26.33	50
Section 26.33(a)	17
Section 26.41(c)	45
Section 26.43	6, 45
Section 26.45	37, 44, 49
Section 26.45(b)	6, 39, 42
Section 26.45(c)	6
Section 26.45(d)	6, 40
Section 26.47	7, 45
Section 26.51	37
Section 26.51(a)	6, 16, 38, 42
Section 26.51(b)	6
Section 26.51(b)(1)	43

Regulations—Continued:	Page
Section 26.51(b)(2)	43
Section 26.51(b)(3)	43
Section 26.51(b)(4)	43
Section 26.51(b)(9)	43
Section 26.51(d)	6
Section 26.51(f)	44
Section 26.51(f)(1)	6
Section 26.53(a)	7, 45
Section 26.53(a)(2)	45
Section 26.61(b)	4
Section 26.67	48
Section 26.67(a)	4, 46
Section 26.67(a)(1)	5, 39, 46
Section 26.67(a)(2)	7, 39
Section 26.67(a)(2)(i)	5
Section 26.67(b)	4
Section 26.67(b)(1)	5, 39
Section 26.67(b)(2)	5, 40
Section 26.83(j)	40, 44
Section 26.87	5, 40
Section 26.87(a)	40
Section 26.87(b)	40
Section 26.107(e)	5, 47
Appendix E	4
Miscellaneous:	
Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs, 103d Cong., 2d Sess. (1994)	29
144 Cong. Rec. (daily ed.):	
Mar. 5, 1998:	
p. S1403	30
p. S1404	13, 31

Miscellaneous—Continued: Page

p. S1409 ..... 12, 13
pp. S1409-1410 ..... 13, 31
p. S1413 12
p. S1420 13
pp. S1420-1421 31
p. S1422 ..... 12, 31
pp. S1423-1425 13
pp. S1429-1430 ..... 12, 31
pp. S1430-1431 13
Mar. 6, 1998:
p. S1482 ..... 13, 30
pp. S1485-1486 13
p. S1493 ..... 30, 31
p. S1496 ..... 13, 32
Apr. 1, 1998:
p. H2000 32
p. H2011 ..... 13, 32
May 22, 1998:
pp. S5413-5414 13
p. S5413 30
p. S5414 ..... 30, 32
p. H3958 ..... 28, 31
p. H3959 28
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p. 26,041 25
p. 26,042 ..... 1, 9
pp. 26,042-26,063 2
p. 26,043 7
p. 26,045 ..... 9, 47
pp. 26,045-26,046 9
p. 26,046 9

Miscellaneous—Continued: Page

pp. 26,046-26,047 ..... 9, 37
p. 26,048 ..... 10, 44
p. 26,049 ..... 9, 10, 39, 42, 44
p. 26,050 25
63 Fed. Reg. (1998):
p. 35,714 10
pp. 35,714-35,715 37
64 Fed. Reg. (1999):
p. 5096 ..... 2, 7, 45, 49
pp. 5100-5102 12-13
pp. 5101-5103 2
pp. 5102-5103 45
p. 5107 45
p. 5112 42
p. 5129 2
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Miscellaneous—Continued: Page

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Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-98) is reported at 228 F.3d 1147. The opinion of the district court (Pet. App. 128-201) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The Court granted certiorari on March 26, 2001, and on April 13, 2001, limited the grant to two reformulated questions presented. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and relevant portions of the Fifth and Fourteenth Amendments to the Constitution, U.S. Const. Amends. V, XIV, are reproduced Gov't App. 1a. Relevant provisions of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, are reproduced Gov't App. 2a-7a, and provisions of the Small Business Act, 15 U.S.C. 631 *et seq.*, are reproduced Gov't App. 8a-17a. Relevant portions of Department of Transportation regulations, 49 C.F.R. Pt. 26, are reproduced Gov't App. 17a-71a; provisions of the Federal Acquisition Regulations, 48 C.F.R. Pt. 19, are reproduced Gov't App. 72a-100a; and the Department of Justice's proposed guidelines for the use of race-conscious remedies in federal spending programs, 61 Fed. Reg. 26,042 (1996), are reproduced Gov't App. 101a-189a.

STATEMENT

Congress has found that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack equal "opportunity for full participation in our free enterprise system," and thus are "socially and economically disadvantaged" on account of race or ethnicity. 15 U.S.C.

631(f)(1). See also Act of Oct. 24, 1978, Pub. L. No. 95-507, § 201, 92 Stat. 1760. Congress therefore has attempted to ensure that past discrimination and present bias do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 504 (1989). *E.g.*, *Fullilove* v. *Klutznick*, 448 U.S. 448, 465 (1980) (plurality) (upholding legislation addressing the "effects of past inequalities stemming from racial prejudice" that continue to "adversely affect[] our present economic system") (quoting H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2 (1975)).

This case arises out of Congress's longstanding efforts to distribute federal highway construction and transit funds, and the opportunities created by those funds, in a manner that does not reflect or reinforce prior and existing patterns of discrimination in that industry. Specifically, this case concerns the constitutionality of Congress's recent reauthorization of programs designed to address discrimination in highway contracting, and the Department of Transportation's (DOT's) efforts to implement that statutory directive.

As petitioner concedes (Br. 15), there has been considerable confusion over precisely which statutory and regulatory provisions petitioner is challenging. The district court held that the Subcontractor Compensation Clause (SCC) that petitioner originally challenged was unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, *id.* at 59-60; DOT has not sought further review; and that program has been discontinued, *id.* at 97. The regulatory provisions that this Court considered in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand I*), moreover, have been replaced with new regulations designed to respond to that decision, 64 Fed. Reg. 5096, 5101-5103, 5129 (1999); 49 C.F.R. Pt. 26; see also 61 Fed. Reg. 26,042-26,063 (1996).

Consequently, what remains in controversy in this case is quite narrow; the case at most involves a facial challenge to Congress's reauthorization of the Disadvantaged Business Enterprise (DBE) program and the current version of the regulations that implement that statutory provision. Petitioner, moreover, purports to limit its challenge further, asserting (Br. 15-16, 27) that it is not challenging *any* of the conditions DOT places on aid to States and localities through DOT's DBE program. Instead, petitioner now claims that it is challenging only the statutes and regulations relating to DOT's *direct procurement* of highway construction on federal lands, which represents a small fraction (less than one percent in 1999) of total federal highway construction and transit spending. DOT, however, does *not* use race-conscious factors (such as incentives or contract goals) in making direct federal procurement decisions in *any* jurisdiction in which petitioner operates. The court of appeals held that petitioner lacks standing to challenge the direct federal procurement provisions that petitioner now targets; and petitioner never sought review of that holding. Thus, it is not at all clear that there remains any cognizable controversy before the Court.

Nonetheless, the decision below, this Court's second question presented, and even petitioner at various points in its brief, focus on DOT's DBE regulations, which govern DOT's aid program for States and localities. Unlike the direct federal procurement provisions, DOT's DBE regulations for state and local aid permit the award of contracts based on race-conscious measures in jurisdictions in which petitioner operates and so provide a potential basis for prospective relief. A description of those DOT regulations, of the regulations governing direct federal procurement in all federal agencies, and of this case's complex procedural history, is set forth below.

1. *DOT's Current DBE Program.* In response to this Court's decision in *Adarand I*, DOT in February of 1999 issued new regulations revamping its DBE program. Consistent with TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), DOT's DBE program employs the definitions of "social" and "economic" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* See also *Adarand I*, 515 U.S. at 208 (noting similar incorporation of those definitions by TEA-21's predecessors). Thus, for purposes of the DBE pro-

gram, an individual is "[s]ocially disadvantaged" if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to * * * individual qualities." 15 U.S.C. 637(a)(5). An individual is "[e]conomically disadvantaged" if his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). Those basic definitions are race neutral. The determining factor is not the individual's race; it is having suffered discrimination on account of race, ethnicity or cultural bias—without regard to what that race, ethnicity or culture might be—and having sustained diminished capital and credit opportunities compared to those who have not been victims of such discrimination. The Secretary's regulations make it clear that the DBE program is aimed at everyone, regardless of race or ethnicity, who meets the statutory criteria for social and economic disadvantage based on individual experience. See 49 C.F.R. 26.61(b) & Pt. 26, App. E.

As required by Congress in TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), the Secretary's regulations also incorporate a race-based presumption from the SBA. See *Adarand I*, 515 U.S. at 204 (noting similar requirement in predecessor statute). In particular, TEA-21 adopts the SBA's presumption "that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the" SBA, 15 U.S.C. 637(d)(3)(C). See 49 C.F.R. 26.67(a). Pursuant to the statute, see TEA-21, § 1101(b)(2)(B), 112 Stat. 113, the Secretary's regulations articulate a further presumption that women are disadvantaged in the highway construction and transit industry. See 49 C.F.R. 26.67(a). Those presumptions of social and economic disadvantage are rebuttable. See 49 C.F.R. 26.67(a) and (b).

Pursuant to his authority to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies" as a DBE, see TEA-21, § 1101(b)(4), 112 Stat. 114; *Adarand I*, 515 U.S. at 208, the Secretary has issued regulations designed to channel benefits under the DBE program to firms owned by individuals who are, in fact, socially and economically disadvantaged. DOT thus requires, 49 C.F.R. 26.67(a)(1), applicants for DBE certification who are statutorily presumed to be disadvantaged to "submit a signed, notarized certification that" they are "in fact, socially and economically disadvantaged." By statute, applicants are not, in fact, socially and economically disadvantaged unless they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), *and* their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," 15 U.S.C. 637(a)(6)(A). The regulations admonish applicants that DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e).

Applicants for DBE certification must also disclose their owners' personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If the owner's covered assets exceed $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual is ineligible for the DBE program, regardless of race, ethnicity or gender. 49 C.F.R. 26.67(b)(1). Anyone may challenge DBE certifications. 49 C.F.R. 26.87. If a state or local grant recipient has a reasonable basis to believe that the owner of a DBE in fact is not socially and economically disadvantaged, it may commence an investigation. 49 C.F.R. 26.67(b)(2).

To ensure that remedies for the effects of discrimination are tailored to local conditions, the Secretary's regulations

require States and localities receiving federal aid to establish numerical measurements, based on local DBE availability and other evidence, to assess discrimination in their own jurisdictions. In particular, state and local recipients must estimate "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). Recipients are expressly prohibited from establishing a rigid figure based on past goals, a flat ten percent goal, or the racial composition of the local populace. *Ibid.* Instead, recipients must first consider "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on * * * DOT-assisted contracts." 49 C.F.R. 26.45(b) and (c). Recipients then must "examine all of the evidence available" in the jurisdiction to determine what adjustments should be made to ensure that the resulting standard realistically reflects the level of DBE participation that would be expected absent the effects of discrimination. 49 C.F.R. 26.45(d).

With respect to remedies, the Secretary's regulations provide that state and local aid recipients must seek to eliminate the effects of discrimination through race- and gender-neutral means to the maximum feasible extent. 49 C.F.R. 26.51(a). Recipients must consider arranging solicitations in ways that facilitate participation by all small businesses, including DBEs; providing race-neutral assistance in overcoming limitations such as the inability to obtain bonding or financing; offering technical assistance and services to small businesses; and engaging in outreach efforts. 49 C.F.R. 26.51(b). Race-conscious measures, such as DBE goals for individual contracts, may be used *only* if race-neutral means prove insufficient. 49 C.F.R. 26.51(d). Quotas are expressly prohibited, and the Secretary will not authorize the use of set-asides except in the most egregious instances of otherwise irremediable discrimination. 49 C.F.R. 26.43. Recipients must discontinue the use of race-conscious measures if, at any point, it appears that they can achieve adequate DBE participation through race-neutral means. 49 C.F.R. 26.51(f)(1).

Recipients of DOT financial assistance may apply to DOT for waivers from almost any DBE regulation if they can achieve or have achieved equal opportunity through other approaches, or if special circumstances make compliance impractical. 49 C.F.R. 26.15. Moreover, no penalty is imposed on contractors or recipients for failing to meet annual goals. 49 C.F.R. 26.47. When race- and gender-neutral measures are inadequate and a recipient establishes a DBE participation goal for particular contracts, contractors need only pursue that goal in good faith; they are not required to achieve it. 49 C.F.R. 26.53(a). If a "bidder/offeror does document adequate good faith efforts," a State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2).

2. *Direct Federal Procurement.* Although the above-described regulations are the only provisions that may arguably provide any basis for prospective relief, petitioner asserts that it is not challenging those provisions, and purports to challenge only the statutory and regulatory provisions that govern DOT's direct procurement of highway construction on federal lands. The procedures and standards for certifying DBEs in the state and local aid program (described pp. 3-5, *supra*) and those used for purposes of direct federal procurement share some critical features. See Pet. Br. 10; note 1, *infra*. Nonetheless, DOT's direct procurement is generally governed by a different regulatory regime. In particular, while DOT's state and local aid program is governed by DOT's DBE regulations, issued by the Secretary of Transportation under TEA-21, direct federal procurement is governed by the SBA, including Sections 8(d)(4)-(6), 15 U.S.C. 637(d)(4)-(6), and the regulations promulgated thereunder. See 61 Fed. Reg. at 26,043 & n.5; 64 Fed. Reg. at 5096; 49 C.F.R. 26.3. Those provisions are not specific to DOT; they apply government-wide.

The SBA broadly seeks to promote contracting opportunities for small businesses, including small disadvantaged busi-

nesses or "SDBs" (which are similar to DBEs),[1] HUBZone small businesses, veteran-owned businesses, service-disabled veteran-owned businesses, and women-owned businesses. Section 8(d)(1) of the SBA establishes a policy of ensuring that such businesses have opportunities to participate in the performance of federal contracts. 15 U.S.C. 637(d)(1). Section 8(d)(4) of the SBA requires businesses seeking federal contracts to adopt, and make a good faith effort to comply with, a subcontracting plan. 15 U.S.C. 637(d)(4); 48 C.F.R. 19.702. Under Section 8(d)(6), the subcontracting plan must describe the efforts the business will undertake to ensure "that small business concerns," including SDBs, women-owned businesses, HUBZone businesses, and veteran-owned businesses, "will have an equitable opportunity to compete for subcontracts." 15 U.S.C. 637(d)(6)(C). Although the subcontracting plan must establish "percentage goals" for the use of such businesses, 15 U.S.C. 637(d)(6)(A); 48 C.F.R. 19.704, no penalty may be imposed on any prime contractor that fails to meet those goals, so long as the prime contractor has made a "good faith effort," 48 C.F.R. 19.705-7. Finally, the SBA authorizes federal agencies to use financial or other incentives as the agency "may deem appropriate in order to encourage" subcontracting with such small businesses. See 15 U.S.C. 637(d)(4)(E).

Following this Court's decision in *Adarand I*, the Justice Department issued proposed guidelines to govern the use of

[1] The Small Business Administration's regulations governing SDB certification recognize a rebuttable presumption of disadvantage (13 C.F.R. 124.103(b)(1), 124.1008(e)(1)); require a statement of social disadvantage (13 C.F.R. 124.103, 124.1008(e)); impose a cap of $250,000 or $750,000 for determining economic disadvantage (13 C.F.R. 124.104(c)(2), 124.1008(e)(1)); and allow any person to challenge a certification decision (13 C.F.R. 124.103(b)(3), 124.1008(e)(1)(ii), 124.1017). Women-owned businesses are not presumed to be SDBs under the SBA, but they are presumed to be DBEs under TEA-21 and DOT's regulations. The Small Business Administration and DOT recently entered into a cooperative agreement regarding the use of certifications in the two programs. See 66 Fed. Reg. 23,208 (2001).

race-conscious remedies under the SBA, such as contract goals and financial incentives, to ensure compliance with constitutional requirements. See 61 Fed. Reg. at 26,042; 48 C.F.R. 19.201. Those guidelines in some respects parallel DOT's DBE program. The Department of Commerce now performs market-specific benchmark studies to estimate "the level of" SDB "contracting that one would reasonably expect to find in a market absent discrimination or its effects." 61 Fed. Reg. at 26,045. Compare pp. 5-6, *supra* (DOT requirement for federal aid recipients). The Department of Commerce begins by calculating the capacity of SDBs available and qualified to perform government contracts in the relevant region and industry, and then compares that to the capacity of non-SDB contractors, accounting for additional factors such as age and size. See 61 Fed. Reg. at 26,045-26,046. The Department of Commerce then may make adjustments based on relevant data and regression analysis that "holds constant a variety of variables that might affect business formation so that the effect of race can be isolated." *Id.* at 26,046. Where the comparison between the benchmark and actual SDB utilization does not indicate a disparity suggesting discrimination or its continuing effects, the guidelines *prohibit* federal agencies from using race-conscious mechanisms to promote SDB participation. See *id.* at 26,046-26,047; 48 C.F.R. 19.201(b).

If, on the other hand, the benchmark study reveals disparities suggesting that discrimination or its effects still influence the allocation of federal opportunities and funds, the guidelines "require[] that agencies at all times use race-neutral alternatives," such as technical assistance and outreach, "to the maximum extent possible." See 61 Fed. Reg. at 26,049. For example, agencies must consider eliminating surety costs from bids where bonding presents a barrier to entry, ensure that SDBs are not excluded from mailing lists, and eliminate practices that disproportionately disadvantage SDBs. *Ibid.* See also 48 C.F.R. 19.202-2. Contracting officers must also consider dividing contracts into reasonably small lots, adjusting delivery schedules, or altering contract

structures to facilitate small business participation. 48 C.F.R. 19.202-1. Only "where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked." 61 Fed. Reg. at 26,049. Even then, agencies may not "set contracts aside for bidding exclusively by" SDBs. *Id.* at 26,048. The system thus represents "a good faith effort to remedy the effect of discrimination," but without guaranteeing any particular level of SDB contracting. *Ibid.*

The Department of Commerce has completed one benchmark study. See 64 Fed. Reg. at 52,806; 63 Fed. Reg. 35,714 (1998). As a result of that study, the use of race-conscious criteria in direct federal procurement of highway construction is proscribed in a majority of regions. See 64 Fed. Reg. at 52,807 (for major industry group 16, race-conscious criteria proscribed except in the East and West South Central regions). Consequently, as petitioner concedes, DOT cannot use race-conscious remedies to encourage the use of DBEs in direct federal procurement contracts in areas "such as Colorado, Adarand's area of operations." Pet. Br. 14.

3. *Procedural History*. This case arose out of the Federal Highway Administration's (FHWA's) former use of SCCs, a now-rescinded device FHWA used under the statutes that preceded TEA-21. FHWA is the agency within DOT responsible for highway construction programs. SCCs provided bonus payments as a financial incentive to prime contractors for subcontracting with SDBs/DBEs on direct federal highway construction projects. See *Adarand I*, 515 U.S. at 209. The district court declared the SCC program, as previously administered, unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, *id.* at 59-60; and DOT has not sought review of that ruling. As a result, the now-rescinded SCC, the only feature of DOT's former regulatory regime ever allegedly applied to petitioner's detriment, is no longer at issue in this case. This lawsuit, however, has outlived the program that provoked it.

a. In 1989, FHWA's Central Federal Lands Highway Division awarded a prime contract to construct a highway on

federal land in West Dolores, Colorado, to Mountain Gravel & Construction Company. Pet. App. 132. The contract contained an SCC, and Mountain Gravel selected Gonzales Construction, a DBE certified by the State of Colorado, to be a subcontractor on a portion of the job. *Id.* at 132-133. On August 10, 1990, petitioner brought this action for declaratory and injunctive relief, claiming that Mountain Gravel had rejected its lower bid for the subcontract because of the SCC. *Adarand*, 515 U.S. at 205. The complaint alleged that the SCC violated 42 U.S.C. 1983, 42 U.S.C. 2000d *et seq.* (Title VI), and the Fifth and Fourteenth Amendments.

The district court initially upheld the SCC under intermediate scrutiny, *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240, 244-245 (D. Colo. 1992), and the Tenth Circuit affirmed, *Adarand Constructors, Inc.* v. *Peña*, 16 F.3d 1537, 1539 (1994). This Court vacated the court of appeals' judgment, holding that strict scrutiny governs whether race-based classifications violate the equal protection component of the Fifth Amendment's Due Process Clause. *Adarand I*, 515 U.S. at 227. The Court remanded the case for a determination of "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 238.

Following remand, petitioner filed a First Amended Complaint, seeking, *inter alia*, a declaration that "§ 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado." Pet. App. 141.[2] In June of 1997,

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[2] The STAA, the STURAA, and ISTEA are the statutory predecessors to TEA-21. The STAA is the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; STURAA is the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146; and ISTEA is the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921. The definitions of social and economic

before the Secretary's revised regulations (described pp. 3-7, *supra*) took effect, the district court granted petitioner's motion for summary judgment. Pet. App. 128-201. The court found that the DBE program met the compelling interest requirement of the strict scrutiny test. The court was "unpersuaded by [petitioner's] argument that the vast body of evidence before Congress as it considered the challenged enactments, and the numerous studies compiled more recently," are insufficient to establish Congress's compelling interest. *Id.* at 177. Congress, the court held, had "a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority businesses." *Id.* at 178.

The district court, however, concluded that the SCC program was not sufficiently narrowly tailored to meet that need. Pet. App. 181-200. The court declared unconstitutional Section 106(c) of STURAA and Section 1003(b) of ISTEA, which authorized the DBE program for federally aided state and local projects, as well as the SCC, which was used in direct federal procurement of highway construction on federal lands. *Id.* at 200-201. DOT moved for the court to clarify the scope of the order, arguing that the federal aid program for state and local projects was not at issue, but the court denied DOT's motion. R. 109 (June 23, 1997).

b. In 1998, while the case was pending on appeal before the Tenth Circuit, Congress reconsidered the DBE program and determined that remedial measures remained necessary to address the effects of discrimination and, accordingly, reauthorized those measures in TEA-21. Congress considered evidence of overt discrimination in the awarding of subcontracts, discrimination in the provision of business loans and bonding, and the adverse consequences of an "old-boy" network and bid-shopping practices that continued the exclusion of certain groups. 144 Cong. Rec. S1409, S1413, S1422, S1429-1430 (Mar. 5, 1998). See 64 Fed. Reg. at 5100-

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disadvantage, including the racial presumptions, have remained essentially unchanged from the STAA to TEA-21.

5102 (summarizing). It also considered data showing that, where States terminated their own DBE programs, DBE participation in the state-funded portion of the highway program fell to nearly zero. See 144 Cong. Rec. at S1404, S1409-1410, S1420 (Mar. 5, 1998); *id.* at S1482 (Mar. 6, 1998).

Congress also considered DOT's proposed revisions to its DBE regulations. DOT had proposed those revisions to respond to this Court's decision in *Adarand I*, to address outstanding practical concerns, and to ensure that the program more narrowly benefits small firms owned by individuals who truly have suffered the effects of discrimination. 144 Cong. Rec. at S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998). The House Report noted that DOT would continue its review of "the DBE program in light of recent court rulings" and that DOT had "proposed new regulations to ensure that the program withstands constitutional muster." H.R. Rep. No. 550, 105th Cong., 2d Sess. 410 (1998). During the debates, both houses of Congress considered and rejected amendments that would have eliminated the DBE program. 144 Cong. Rec. at S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). In February of 1999, DOT issued the anticipated regulations, described above (pp. 3-7, *supra*).

c. Shortly thereafter, in March of 1999, the court of appeals held the case moot because Colorado had certified petitioner as a DBE. *Adarand Constructors, Inc.* v. *Slater*, 169 F.3d 1292 (10th Cir. 1999). This Court reversed. *Adarand* v. *Slater*, 528 U.S. 216 (2000) (per curiam). After this Court remanded the case, FHWA eliminated the SCC, the financial incentive program the Court had considered in *Adarand I*. See Pet. App. 97 ("Adarand does not dispute" that "the SCC, which spawned this litigation in 1989, is no longer in use.").

4. *The Court Of Appeals' Decision.* After supplemental briefing in light of those developments, the court of appeals affirmed in part and reversed in part. Pet. App. 1-81.

a. The court of appeals first identified the statutory and regulatory provisions properly at issue in this case. The court of appeals concluded that petitioner had standing to

challenge the SCC program, which had formed part of the contract petitioner had been denied, and to raise a facial challenge to "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause" and incorporated from the SBA into TEA-21. Pet. App. 13. The court of appeals, however, concluded that petitioner lacks standing to challenge the presumption of disadvantage for women-owned enterprises. *Id.* at 13-14. The court further held that petitioner lacks standing to challenge any provision of the SBA other than the definitions that are incorporated into TEA-21. Thus, the court concluded that petitioner cannot make a "generalized challenge" to the SBA's policy regarding contracting opportunities for small disadvantaged businesses, or "paragraphs (4)-(6) of 15 U.S.C. 637(d)," *i.e.*, Sections 8(d)(4)-(6) of the SBA, which address subcontracting plans. Pet. App. 14. See also *id.* at 86 n.35.

b. Turning to the constitutionality of the statutes and regulations properly at issue, the court of appeals agreed with the district court that the government had established a compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies," Pet. App. 54, and in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," *id.* at 25. The court of appeals found "a strong basis in [the] evidence" before Congress for concluding "that racial discrimination and its continuing effects have distorted the market for public contracts." *Id.* at 24. For example, the court noted evidence before Congress showing that prime contractors refused "to employ minority subcontractors due to 'old boy' networks." *Id.* at 34. See also *id.* at 41 (noting that the evidence "strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms"). The evidence was "particularly striking in the area of the race-based denial of access to capital." *Id.* at 35. See also *id.* at 34-38 (reviewing evidence). Minority subcontractors also confronted "overt racial discrimination" in areas such as the provision of performance and payment bonds needed to compete for government contracts. *Id.* at 42-43. Further, the court explained, there was evidence of discrimination in pricing by suppliers, under which "nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors," a practice that makes minority subcontractors less competitive. *Id.* at 44.

The court of appeals also relied on local disparity studies conducted by numerous state and local governments. Pet. App. 44-48. While conceding the limitations of those sources, the court concluded that the consistent disparity between the use and availability of qualified DBE subcontractors "raises an inference that the various discriminatory factors" identified by Congress had "created that disparity." *Id.* at 46. The significance of the studies, the court explained, was increased by specific evidence showing that discrimination reduced the opportunities of existing minority enterprises and prevented the formation of new ones. *Id.* at 48. Finally, the court noted that, when States discontinued their own DBE programs, DBE participation dropped dramatically or disappeared altogether. *Id.* at 49. "Although that evidence standing alone is not dispositive, it strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination." *Ibid.*

The court of appeals declined to accept petitioner's "vague urgings" that the studies were unreliable, Pet. App. 46-47 n.14, or petitioner's "highly general criticism" of methodology, *id.* at 51. Petitioner, the court explained, had failed to identify specific flaws in the studies or introduce evidence of its own in district court, despite opportunities to do so. *Ibid.* In sum, the court concluded, the evidence "demonstrates that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises * * * are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market." *Id.* at 52. "The Consti-

tution does not obligate Congress to stand by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice." *Ibid.*

c. The court of appeals also concluded that the current DBE program is "narrowly tailored." The court first found that certain provisions of the *prior* DBE certification process failed the narrow-tailoring test. Pet. App. 72-74. Specifically, it held that the automatic use of financial bonuses to encourage use of DBEs, as originally contemplated by the SCC, could not pass constitutional muster. *Id.* at 79-80. But the court concluded that the new DOT regulations cured the constitutional deficiencies. *Ibid.* The court of appeals explained that petitioner had not challenged the district court's finding that Congress had tried without success to cure the effects of discrimination through race-neutral means. *Id.* at 57-58. Moreover, DOT's regulations require recipients to maximize the use of race-neutral means before resorting to race-conscious methods, 49 C.F.R. 26.51(a), a requirement that helps to ensure narrow tailoring. Pet. App. 59-60.

The court of appeals also stressed the program's durational limits. The DOT DBE program itself expires at the end of fiscal year 2003 together with TEA-21. Pet. App. 62-63. Congress's extensive debate regarding whether to renew the DBE program before passing TEA-21 underscored Congress's view that there was a continuing remedial need for the DBE program. *Ibid.*

The court of appeals held that the DBE program complied with the narrow tailoring considerations discussed in *United States* v. *Paradise*, 480 U.S. 149 (1987). First, the court found that 49 C.F.R. 26.15's express waiver provision, which allows recipients to seek exemption from DBE requirements "despite the already non-mandatory nature of DBE programs," afforded appropriate flexibility. Pet. App. 64. Second, each state and local recipient of federal funds must establish its own numerical goals based on local circumstances. *Id.* at 66. Third, the DBE program does not impose an undue burden on third parties. *Id.* at 69-71. For example, the new regulations "require recipients to ensure that DBEs are not 'so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate.'" *Id.* at 70 (quoting 49 C.F.R. 26.33(a)). Finally, the court of appeals rejected petitioner's argument that Congress must inquire into discrimination against each particular minority group in each State's construction industry, so as to ensure that the DBE program is not over- or under-inclusive. *Id.* at 71-79.

SUMMARY OF ARGUMENT

I. DOT's current DBE program is not unconstitutional on its face. DOT has discontinued the SCC program that caused petitioner's alleged injury, and petitioner alleges no specific injury from DOT's current regulations. Accordingly, petitioner can mount only an abstract facial challenge, and cannot prevail unless it can demonstrate that TEA-21's DBE provisions and the implementing regulations are incapable of constitutional application.

Petitioner has narrowed its challenge to DOT's direct federal procurement activities. However, DOT does not employ any race-conscious measures in making direct procurement decisions in any jurisdiction in which petitioner does business. Accordingly, petitioner lacks standing to challenge the only program it purports to challenge. Indeed, the court of appeals specifically held that petitioner lacks standing to challenge the statutory provisions petitioner now targets, and petitioner has never challenged that holding. It is hard to imagine a more abstract vehicle for this Court to address the serious constitutional issues raised by petitioner.

II. A. DOT's DBE program promotes the "compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion of O'Connor, J.). Petitioner concedes (Br. 22) that the use of race-conscious

measures as "a last resort effort to 'remedy private discrimination'" constitutes a "possible justification" for race-conscious government action. Petitioner, therefore, concentrates its attack not on the sufficiency of the government's interest, but on the adequacy of the record before Congress. But Congress authorized the Secretary to adopt a DBE program against a backdrop of extensive evidence of public and private discrimination in highway contracting. Congress likewise authorized the DBE program only after race-neutral efforts to improve access to capital and ease bonding requirements had proven inadequate. Congress then reauthorized the DBE program on three separate occasions, each time after further investigation. Whatever the alleged methodological shortcomings of some of the studies before Congress, Congress had a sufficient evidentiary basis to enact legislation designed to ensure that federal funds do not reinforce observed patterns of discrimination. This is true even if Congress did not have evidence of discrimination in every jurisdiction across the Nation. Congress is not limited to remedying discrimination that exists uniformly throughout the United States, especially where the implementing regulations seek to limit race-conscious remedies to jurisdictions where the effects of discrimination remain a problem and race-neutral remedies have proved insufficient.

B. Congress, as part of its effort to address the lingering problem of discrimination in the distribution of contracting opportunities in federally aided highway projects, granted substantial discretion to the Secretary. DOT regulations defeat petitioner's claim that the program is unconstitutional on its face. First, notwithstanding the statute's racial presumption, the regulations seek to limit DBE status to firms owned by individuals who have suffered the effects of discrimination. Discrimination, not race, is the key to DBE status. For example, if a firm's owner exceeds regulatory net-worth limits, the firm cannot qualify as a DBE, no matter what the owner's race. Second, state and local recipients of federal aid must assess the local market to determine whether there is a need for race-conscious remedies to

redress the effects of discrimination in their jurisdiction. Even where such a need is identified, aid recipients may use race-conscious remedies only as a last resort. Third, the regulations have built-in flexibility to allow aid recipients to address the specific problems confronted in a particular jurisdiction. For example, the regulations make most regulatory provisions waivable. Although petitioner suggests that certain aspects of those regulations will prove ineffectual and that others deviate from the statutory design, neither of those concerns is properly presented in this facial challenge.

Finally, petitioner argues that, even with those regulatory safeguards, the use of the statutory race-based presumption of disadvantage by itself renders the entire program unconstitutional. But this Court has never suggested that the government may not take race into account in attempting to identify the effects of racial discrimination. In jurisdictions where race-neutral remedies suffice, the statutory presumptions of disadvantage serve only to help identify underutilization of DBEs that may evidence discrimination or its effects. In other jurisdictions, the presumptions may result in providing contracting opportunities to businesses owned by individuals who have certified (in a notarized document and subject to the possibility of criminal prosecution) that they have suffered the effects of discrimination, but that is no basis for invalidating the statute and the Secretary's regulations on their face.

ARGUMENT

I. PETITIONER CANNOT PREVAIL ON ITS FACIAL CHALLENGE AND LACKS STANDING TO CHALLENGE THE STATUTORY AND REGULATORY PROVISIONS IT NOW PURPORTS TO CHALLENGE

In this case, petitioner seeks a declaration that the DBE program is unconstitutional "on its face," Pet. Br. 9, to the extent it borrows a racial presumption from Section 8(d)(3) of the SBA to identify socially and economically disadvantaged individuals. Because petitioner challenges the statute and regulations on their face, petitioner cannot prevail

merely by asserting that they *might* be applied in an unconstitutional manner. Instead, petitioner may prevail only if it "[i]s apparent that" the statute and regulations "could *never* be applied in a valid manner." *Members of the City Council of the City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984) (emphasis added). A facial challenge is thus "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid. The fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Accordingly, the narrow issue before the Court is whether the statutory DBE presumption and DOT's DBE regulations are incapable of constitutional application.[3]

Petitioner purports to narrow further the issues before this Court by limiting its challenge to the statutory provisions that govern direct federal procurement. Petitioner has always focused on the statutory definitions of "socially and economically disadvantaged," which Congress incorporated into TEA-21 from Section 8(d)(3) of the SBA, as well as the certification standards and procedures employed to identify DBEs. Those standards and procedures apply both to DOT's aid program, which provides federal funds to state and local governments, and to DOT's direct spending for highway construction on federal land. See pp. 7-8 & note 1, *supra*; Pet. Br. 7, 9, 16.

Purporting to clarify the scope of its challenge, petitioner now declares that it is *not* challenging any aspect of DOT's state and local aid program. "[T]his case," petitioner declares, "involves only" DOT's direct federal contracts. Pet. Br. 15-16, 27. Petitioner thus does not ask this Court to review the Secretary of Transportation's DBE program, which the court of appeals upheld, and which this Court identified in the second question presented. Rather, petitioner focuses on the government-wide "goal setting" and "goal achievement mechanisms" implemented under Section 8(d)(4) through 8(d)(6) of SBA, 15 U.S.C. 637(d)(4)-(6), and the Federal Acquisition Regulations (FAR), 48 C.F.R. Pt. 19. See Pet. Br. 13-14; see also pp. 7-8, *supra*. In fact, petitioner now claims that it is injured, not by anything TEA-21 or the Secretary's DBE regulations require, but by the subcontracting plan requirement found in Section 8(d)(4)(B), 15 U.S.C. 637(d)(4)(B), under which prime contractors must submit contract-specific plans that establish subcontracting goals for DBE participation. Pet. Br. 13-14.

Petitioner, however, did not properly challenge Sections 8(d)(4) through 8(d)(6) of the SBA in the courts below, and those courts did not consider such a challenge. The court of appeals found "no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit." Pet. App. 86 n.35. Nor were those provisions ever part of this case. The "scope of this case," petitioner declares, "includes all of the statutory definitional underpinnings, goal setting, and goal achievement mechanisms that *gave rise to the terms of the* * * * *contract*" petitioner was denied in 1989. Pet. Br. 15 (emphasis added). But Sections 8(d)(4) through (6) of the SBA did not "g[i]ve rise to" any part of that contract. "None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. 637(d)(4), pertains to the SCC." Pet. App. 63 n.24. Nor did any other provision of the SBA petitioner now purports to challenge appear in that 1989 contract. In fact, petitioner's contract specifically stated that it did *not* include the subcontractor plan requirement under Section 8(d)(4). See Gov't App. 201a, 202a.[4]

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[3] No as-applied challenge is properly before this Court. The only feature of the Secretary's program ever applied to petitioner was the SCC that petitioner originally challenged. As noted earlier (pp. 2, 10, *supra*), that program, which was held unconstitutional as applied to petitioner, has been discontinued.

[4] Petitioner's extensive discussion of subcontractor plans, Pet. Br. 13, and its speculation that they are "coercive," *id.* at 14, are thus beyond the scope of this case. Petitioner's claim that the provisions are applied in a

Petitioner's failure to mount a proper challenge to Sections 8(b)(4) through (6) below and the court of appeals' refusal to address those provisions bar their consideration here. *E.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The court of appeals, moreover, specifically held that petitioner lacks "standing to challenge paragraphs (4)-(6) of 15 U.S.C. § 637(d)." Pet. App. 14; *id.* at 86 n.35. See also Pet. Br. 6 n.2 ("The panel denied standing to challenge 15 U.S.C. §§ 637(a), 644(g), and 637(d)(4-6)."). In light of petitioner's failure to challenge that holding in its petition, its attempt to raise Sections 8(d)(4)-(6) of the SBA for the first time in its brief on the merits is unavailing. See *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994).

Petitioner's belated attempt to "smuggl[e] additional questions" into this lawsuit, *Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 n.6 (1993), is particularly problematic because petitioner has not shown any realistic possibility that it will be injured by an application of paragraphs 8(d)(4) through (6). Those paragraphs are implicated only by DOT's direct contracting, not DOT's state and local aid program. But the results of the Department of Commerce benchmark study preclude the use of race-conscious criteria—and therefore consideration of DBE utilization or any race-conscious aspects of paragraphs 8(d)(4)-(6) in making awards—in direct federal contracting in every area in which petitioner does business, as petitioner concedes. Pet. Br. 14; pp. 8-10 & 21 note 4, *supra*. Petitioner thus cannot show any threatened injury from those provisions, much less one that might excuse its dual failures properly to raise those provisions below and to challenge the court of appeals' holding that it lacks standing to raise them.

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coercive manner, moreover, cannot be raised in a facial challenge unsupported by a record that might show how, in fact, those provisions are applied. The claim is also without merit. DOT is not aware of any instance in which contracting decisions have been influenced by the degree of DBE utilization provided in a subcontracting plan in any area where the Department of Commerce's benchmark study bars use of race-conscious criteria, and it is issuing guidance to ensure that such does not occur.

Petitioner's submission also casts serious doubt on the extent to which there remains a real and substantial controversy of any sort. With respect to petitioner's past injury in direct federal procurement, the program that injured petitioner was declared unconstitutional as applied, was discontinued, and is not properly before this Court. See pp. 2, 10, *supra*. With respect to petitioner's claim for forward-looking relief, any alleged continuing injury in direct federal procurement is foreclosed by the termination of the SCC program and the results of the Department of Commerce's benchmark study. If petitioner's assertion that this "case deals exclusively with direct federal procurement," and "has nothing to do with financial assistance," Pet. Br. 27, is accepted, there is simply no basis for prospective relief.

II. TEA-21 AND THE SECRETARY'S DBE REGULATIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST

Eliminating racial discrimination and its effects remains one of the Nation's great challenges. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand I*, 515 U.S. at 237. Congress has found that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack equal "opportunity for full participation in our free enterprise system," and thus are "socially and economically disadvantaged" on account of race or ethnicity. 15 U.S.C. 631(f)(1). Congress therefore has attempted to ensure that past discrimination and present bias do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *Croson*, 488 U.S. at 504.

The Secretary's DBE program, which Congress reauthorized in TEA-21, is one such effort. To the extent that program relies on race-conscious criteria, it is subject to strict scrutiny. Racial classifications—even if employed to combat discrimination and its effects—are constitutional only if they serve a compelling government purpose and are narrowly tailored to achieve that end. *Adarand I*, 515 U.S. at 227. Although that standard is demanding, this Court has gone out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 237. "When race-based action is necessary to further a compelling interest," the Court has stated, "such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out" in its cases. *Ibid.*[5] As explained below, petitioner has not shown that the Secretary's DBE program is incapable of meeting that exacting standard.

A. CONGRESS HAS A COMPELLING INTEREST IN ELIMINATING DISCRIMINATION AND ITS EFFECTS ON GOVERNMENT SPENDING AND PROCUREMENT

"It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492 (plurality opinion). Congress thus may take steps to avoid "becom[ing] a passive participant in a system of racial exclusion practiced by elements of the local construction industry." *Ibid.* And Congress may legitimately invoke its constitutional powers to ensure that such a system does not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *Id.* at 504. Petitioner, in fact, concedes that the use of race-conscious measures as "a last resort to 'remedy private discrimination'" is a "possible justification" for race-conscious government policies. Pet. Br. 22 (quoting *Croson*, 488 U.S. at 492 (plurality opinion)). Accordingly, rather than focus on

[5] Petitioner's argument (Br. 18-23) that racial classifications are *per se* unconstitutional thus is inconsistent with this Court's precedents.

the adequacy of Congress's interest, petitioner argues that Congress did not have a "strong basis in evidence" for finding a national problem of discrimination in highway contracting. See *id.* at 26. The district court and the court of appeals both properly rejected that argument.

1. *Congress Had Ample Evidence Of Discrimination When It Enacted TEA-21*

Treating the compelling-interest inquiry as a question of fact, petitioner argues (Br. 23-28) that the court of appeals erred in relying on legislative and administrative materials that identify the effects of discrimination in the highway construction and transit industry. Such sources, petitioner asserts, are neither "sworn testimony given from personal knowledge" nor otherwise admissible. *Id.* at 23-26. That argument—which was not properly raised below—betrays a misunderstanding of the compelling-interest inquiry, which is, after all, a legal inquiry. Federal courts do not measure the substantiality of Congress's interests by requiring Congress to prove its interest in a *de novo* trial. Instead, federal courts properly "examine first the evidence before Congress," and then review any "further evidence" necessary to resolve the matter. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 196 (1997). The court of appeals and district court followed that methodology and correctly concluded, as a matter of law, that Congress had a compelling interest in enacting TEA-21's contracting provisions and their predecessors. Moreover, even if one were to accept petitioner's effort to recharacterize that legal conclusion as a factual finding, petitioner's request that this Court reconsider the findings of the district court and court of appeals would have to overcome this Court's traditional "reluctan[ce] to disturb findings of fact in which two courts below have concurred." *United States* v. *Doe*, 465 U.S. 605, 614 (1984).[6]

[6] Petitioner's contention (Br. 27) that the court of appeals did not review the legislative record and instead "rel[ied] exclusively on the content of Appendix A,"—*Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,041, 26,050 (1996)—is incorrect. The

The enormous body of evidence before Congress, accumulated over 30 years, establishes the compelling nature of Congress's interest in reauthorizing the DBE program. Throughout the 1970s, a Permanent Select Committee of the House of Representatives conducted extensive hearings on the effects of discrimination on the distribution of contracting opportunities in a variety of industries. See Gov't App. 190a (listing hearings). Based on its investigation, the Committee concluded that past discrimination disproportionately hindered the participation of minority-owned businesses in federal procurement projects. See *Summary of Activities, A Report of the House Comm. on Small Business*, H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977). Congress responded by enacting the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), which this Court upheld in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-478 (plurality); accord *id.* at 458-467, 473; *id.* at 503, 505-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring). See also H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2, 11-12, 28-30, 32 (1975); U.S. Comm'n on Civil Rights, *Minorities and Women as Government Contractors* 20-22, 112, 126-127 (May 1975). Congress's investigations throughout the 1980s and 1990s, Gov't App. 191a-194a, documented that minority-owned firms continue to suffer discrimination and its effects in a variety of ways.[7]

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court of appeals, after conducting its own searching review of the legislative record, concluded "that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by" the government's submission, Pet. App. 33 n.12, and cited materials not mentioned in Appendix A, *e.g.*, *id.* at 36-37 (statements of Toni Hawkins, M. Harrison Boyd, and Anthony Robinson).

[7] See, *e.g.*, *Small and Minority Business in the Decade of the 80's: Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. Pt. 1, 106, 241 (1981) (*1980s Hearings*); *Minority Business and Its Contributions to the U.S. Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. 44-45, 50, 88, 95 (1982). The hearings showed that public and private contracting officers alike retained a negative perception of the skills and competence of minorities. See *1980s Hearings* 106, 114, 118, 241. The House Report found that the observed disparities could "not [be] the result of random chance," and concluded that "past discrimination has hurt the socially and economically disadvantaged individuals in their entrepreneurial endeavors." H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987). The Small Business Administration's annual reports to Congress throughout the 1990s supported that conclusion. See, *e.g.*, *The State of Small Business: A Report of the President to Congress* 362 (1994) (minority-owned businesses represent 9% of total business community but receive 4.1% of federal procurement dollars). See also *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989).

Congress likewise gathered extensive evidence of the incidence of discrimination in the specific context of highway contracting. After having collected such evidence for a decade, Congress in 1982 added a ten-percent nationwide aspirational goal for DBE participation on federally funded highway construction and mass transit projects. See Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100. For two years, through at least eight hearings, Congress then investigated and evaluated the effects of those provisions before renewing them for four years in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146. See Gov't App. 195a (listing hearings). The Senate Report accompanying STURAA explained Congress's decision:

> The Committee has considered extensive testimony and evidence on the bill's DBE provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). Following that renewal, Congress continued reviewing the program, holding hearings and gathering evidence. See Gov't App. 196a-197a (listing hearings). Each time, the evidence showed that discrimination, past and present, continued to deny socially and economically disadvantaged business owners opportunities to participate in and compete for work on federal and federally aided highway construction contracts. As a result, Congress reauthorized the DBE program in ISTEA in 1991, 105 Stat. 1919-1921, and most recently in TEA-21.

The extensive record before Congress included evidence of the specific problems confronted by DBEs. With respect to access to necessary capital, minority applicants generally —and minority applicants in the construction industry in particular—were denied bank loans at a higher rate than non-minorities with identical collateral and credentials. Pet. App. 35-39. A study of the construction industry supported by the U.S. Bureau of the Census and National Science Foundation found that "blacks, controlling for borrower risk, are less likely to have their business loan applications approved than other business borrowers," and generally receive smaller loans when approved. Caren Grown & Timothy Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25, 26, 39 (1992) (Grown & Bates) (Gov't Lodging 1, 2, 15) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (May 22, 1998)).[8] A survey of 58 state and local studies of disparity in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." Maria E. Enchautegui et al., Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (Dec. 1997) (Urban Institute Report) (Gov't Lodging 65) (citations omitted) (discussed by

[8] For the convenience of the Court, we are lodging copies of studies and materials upon which Congress and the court of appeals relied.

Rep. Norton, 144 Cong. Rec. at H3959 (May 22, 1998)). Congress, moreover, heard first-hand accounts of subtle and not-so-subtle discrimination in the provision of needed capital.[9]

Discrimination and entrenched patterns resulting from years of exclusion also prevent minority business owners from obtaining surety bonds, which generally are required by state and federal procurement rules. The "[i]nability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts." *Problems Facing Minority and Women-Owned Small Businesses: An Interim Report*, H.R. Rep. No. 870, 103d Cong., 2d Sess. 14-15 (1994); see also *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 8-9 (1988). Again, Congress heard from individuals who had encountered difficulties created by discrimination and its effects on the availability of bonding.[10]

The evidence showed that some prime contractors engaged in discriminatory bid-shopping, allowing a preferred subcontractor to match any low bid submitted by a minority-owned contractor. See, *e.g.*, *How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 54 (1989); see also *State of Colorado and the Colorado Department of*

[9] For example, one bank denied a minority-owned business a loan to bid on a public contract worth $3 million, but offered a loan for the same purpose to a non-minority-owned firm with an affiliate in bankruptcy. See *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 103d Cong., 2d Sess. 20 (1994) (Toni Hawkins).

[10] See H.R. Rep. No. 870, *supra*, at 9, 16-17 (explaining that one black contractor was forced to seek bonding from out of state after local non-minority competitors told local sureties not to underwrite him). The Louisiana Disparity study provides corroboration. 2 *State of Louisiana Disparity Study* 91, 204-205 (June 1991) (Gov't Lodging 215, 329-330).

Transportation Disparity Study, Final Report 5-56, 5-58 (Apr. 1, 1998) (*Colorado Study*) (Gov't Lodging 636-638) (cited by Sen. Chafee, 144 Cong. Rec. at S1493, S5413 (Mar. 6 & May 22, 1998)); 2 *State of Louisiana Disparity Study* 69, 72-73 (June 1991) (*Louisiana Study*) (Gov't Lodging 189, 193, 196-197) (cited by Sen. Kennedy, 144 Cong. Rec. at S1482 (Mar. 6, 1998)).[11] Some suppliers charged higher prices to minority customers, raising their costs and rendering them less competitive. See, *e.g.*, *Colorado Study* 5-78 (Gov't Lodging 658); *Louisiana Study* 87-88 (Gov't Lodging 211-212); Ray Marshall & Andrew Brimmer, *Public Policy & Promotion of Minority Economic Development*, Pt. 2, at 72-77 (June 29, 1990) (Gov't Lodging 924-929) (minority firm in Georgia found problem so pronounced that it sent white employees to purchase supplies).

Congress also heard evidence that black, Hispanic, Asian, and Native-American-owned businesses were underutilized in government contracts. *E.g.*, Urban Institute Report 11, 14-15, 19-20 (Gov't Lodging 41, 44-45, 49-50). For example, the Urban Institute Report found that minority-owned businesses received only 57 cents out of every state and local contracting dollar that they should have received based on the proportion of "ready, willing, and able" firms that were minority-owned. *Id.* at 1, 19-22, 61 (Gov't Lodging 32, 44-47, 89). Throughout the debates on TEA-21, members of Congress noted study after study, incident after incident, showing gross disparities in utilization.[12] See also *Unconsti-*

[11] See also *Associated Gen. Contractors of Cal., Inc.* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) (citing reports that minority firms were "denied contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"), cert. denied, 503 U.S. 985 (1992); *Cone Corp.* v. *Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 938 (1990).

[12] Hispanic-owned firms received .26% and women-owned firms received .18% of state-funded highway construction contracts in Colorado, while over 99% of the state contracts went to white-owned firms, 144 Cong. Rec. at S5414 (May 22, 1998); in the United States as a whole, minorities own nine percent of construction companies but receive only four percent of construction receipts, *id.* at S1403 (Mar. 5, 1998); white-owned construction firms receive 50 times as many loan dollars as African-American-owned firms with identical equity, *id.* at S1422; African Americans were three times more likely, and Hispanics 1.5 times more likely, to be rejected for business loans than whites, according to a Denver study, *id.* at S1493 (Mar. 6, 1998).

tutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm., 105th Cong., 1st Sess. 55-56, 58-59, 64, 69, 74-76, 120 (1997).

Finally, the evidence showed that the termination of similar state and local DBE programs had almost always caused inordinate disparities to return. DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended, while the federally funded portion (which continued to operate under DOT's DBE program) had a 12.7% participation rate. 144 Cong. Rec. at S1404 (Mar. 5, 1998). In Tampa, after the city discontinued its DBE plan in 1989, the number of contracts awarded to Latinos was suddenly cut in half, while the number of contracts awarded to African Americans fell by 99%. Similarly dramatic drops in DBE participation resulted in Richmond, Virginia; Hillsborough County, Florida; and Philadelphia. See U.S. Comm'n on Minority Business Development, *Final Report* 99 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at H3958 (May 22, 1998)). See also *id.* at S1409-1410, S1420-1421, S1429-1430 (Mar. 5, 1998). Indeed, the recent GAO Report upon which petitioner places great reliance, *Disadvantaged Business Enterprises* (June 2001) (GAO Report), found that DBE contracting had "dramatically declined" when, in the two States it examined, local DBE programs were terminated. See GAO Report 38-41 (Gov't Lodging 1886-1888).[13] As TEA-21's floor manager, Senator Baucus, explained to his

[13] Because petitioner reproduces only part of the GAO Report in its appendix and omits charts and the report's methodology, we have included a complete copy in the lodging (at 1847-1933).

colleagues, such "dramatic decreases in DBE participation in those areas in which DBE programs have been curtailed or suspended" show not merely "underutilization of women- and minority-owned business," 144 Cong. Rec. at S5414 (May 22, 1998), but that race-neutral alternatives sometimes cannot level the playing field.[14]

In view of that record, both houses of Congress in 1998 rejected amendments to TEA-21 that would have eliminated the DBE program. See 144 Cong. Rec. at S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). Even opponents of the DBE program agreed that there was evidence of discrimination. As Representative Roukema, the sponsor of an unsuccessful amendment to repeal the DBE program, explained, the program's opponents "are not suggesting that there is no discrimination." *Id.* at H2000 (Apr. 1, 1998).

2. *Petitioner's Objections To The Evidence Before Congress Are Unsubstantiated And Insubstantial*

Responding to the vast body of evidence before Congress, petitioner argues that *the court of appeals* did not review the evidence under the proper standard. Petitioner argues that it failed to ensure that the statistical evidence before Congress was "derived from the proper sample pool," Pet. Br. 29; did not scrutinize the studies' methodologies, *id.* at 30; and did not ensure that they conclusively eliminated all nondiscriminatory explanations, *id.* at 30-31.

Petitioner misunderstands the judicial role in evaluating the existence of a compelling interest. Federal courts do not sit as peer-review boards to conduct *sua sponte* review of congressional findings and methodologies for scientific accuracy. Petitioner failed to identify the specific evidence it believes unreliable, to provide the reasons for that concern, or to explain how the voluminous evidence remaining could conceivably be insufficient. Nor did petitioner, despite the

[14] This Court often accords the views of a bill's floor managers particular weight in determining legislative intent. See generally *United States* v. *Enmons*, 410 U.S. 396, 405 n.14 (1973); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 686-687 (1978).

opportunity to do so, introduce its own evidence to show that racial discrimination in the highway construction industry and its effects have ceased to exist. Pet. App. 47 n.14. Instead, petitioner offered only "decidedly vague urgings" of bias, *id.* at 46 n.14, an "unfocused attack" on disparity studies generally, *id.* at 47 n.14, and an assertion that the "various congressional reports and findings" were "conclusory," *id.* at 51. Such contentions are an insufficient basis on which to strike down an Act of Congress, much less one founded on 30 years of hearings, investigations, conclusions, and findings. "Given the deference 'due the duly enacted and carefully considered decision of a co-equal and representative branch of our Government,'" this Court does "not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical observations." *Board of Educ. of the Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 251 (1990) (plurality opinion of O'Connor, J.).

In any event, petitioner's challenges to Congress's methods and conclusions are without merit. For example, petitioner asserts (Br. 29) that Congress was required to compare the availability of contractors who "not only have the necessary expertise" but "who also have met * * * bonding requirements and capitalization." Bonding and access to capital, however, are two key areas where Congress found that minority businesses suffer discrimination. See pp. 28-29, *supra*. Adjusting the data as petitioner suggests would thus treat minority businesses as unqualified precisely because they suffer discrimination. In attempting to determine whether discrimination exists, it is not error to omit a variable that itself is tainted by discrimination. See *Coates* v. *Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985); *Valentino* v. *United States Postal Serv.*, 674 F.2d 56, 71 n.26, 73 n.30 (D.C. Cir. 1982).[15]

[15] In addition, petitioner's reliance (Br. 34) on the GAO Report is misplaced. Although the report expressed concern about the difficulty of collecting relevant data regarding subcontractors, such data is available. See, *e.g.*, Urban Institute Report 15-16, 41 (Gov't Lodging 45-46, 71). The

Petitioner's contention (Br. 29) that the studies before Congress may not have compared the appropriate pools of "ready, willing, and able" minority and non-minority contractors in the relevant markets is also unfounded. Study after study made the proper comparisons. See, *e.g.*, Urban Institute Report 19-22 (Gov't Lodging 49-52); *Louisiana Study* 182, 187-194 (Gov't Lodging 306, 311-318). And petitioner is incorrect to assert (Br. 30-31) that the studies did not use tools such as regression analysis to reduce the possibility that the disparities were caused by factors other than discrimination; many did, as petitioner concedes. See Br. 31 (admitting that at least three studies held all the other factors equal). See also Grown & Bates 34, 39 (Gov't Lodging 10, 15); *Louisiana Study* A1-A6 (Gov't Lodging 356-362).

In any event, discrimination need not be "prove[d] * * * with scientific certainty," or using "regression analysis" that "include[s] *all* measurable variables thought to have an effect." *Bazemore* v. *Friday*, 478 U.S. 385, 399-400 (1986) (Brennan, J., concurring). See also *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981) (prima facie case "eliminates the most common nondiscriminatory reasons"). Consequently, a party impeaching a study's validity must do more than hypothesize about factors the study did not consider; instead, it must introduce "evidence to support the contention that the missing factor can explain the disparities." *EEOC* v. *General Tel. Co. of the N.W., Inc.*, 885 F.2d 575, 580 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990) (quoting *Palmer* v. *Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987)). *Concrete Works of Colo., Inc.* v. *City & County of Denver*, 36 F.3d 1513, 1524-1525 (10th Cir. 1994), cert. denied, 512 U.S. 1004 (1995). See also *Dothard* v. *Rawlinson*, 433 U.S. 321,

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GAO Report omitted that information not because it was unavailable, but rather because the GAO's mail survey did not produce the information, and because recipients of the survey did not have the data in an electronic format that would have made its accumulation and manipulation sufficiently easy. See GAO Report 52-59, 62-64, 77 (Gov't Lodging 1900-1907, 1910-1912, 1925).

331 (1977) (party "not required to exhaust every possible source of evidence" because opposing party "is free to adduce countervailing evidence of [its] own"); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Sobel* v. *Yeshiva Univ.*, 839 F.2d 18, 34 (2d Cir. 1988), cert. denied, 490 U.S. 1105 (1989); *Catlett* v. *Missouri Highway & Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988). Petitioner failed to do that here.

More broadly, it is unclear what all of petitioner's statistical criticism really proves. Strict scrutiny requires the government to point to a compelling interest with "a strong basis in evidence" and observable roots in the actual marketplace. It does not require statistical perfection, a standard that social science itself is incapable of achieving. None of petitioner's statistical objections casts genuine doubt about Congress's overall finding of continuing discrimination and its effects in the construction industry.

3. *Congress May Condition Spending To Address Nationwide Problems Affecting Nationwide Appropriations*

Finally, petitioner claims (Br. 33-34) that Congress lacks constitutional authority to enact legislation like TEA-21 unless it finds discrimination in a majority of States. To the extent petitioner asserts that Congress cannot enact even narrowly tailored legislation—legislation that imposes a remedy only in those markets where there is discrimination to remedy—unless it finds discrimination in more than 25 States, the contention is utterly without merit. As a national sovereign, the federal government has a compelling interest in avoiding improper (discrimination-based and discrimination-reinforcing) distribution of federal funds nationwide. Thus, while a state or local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to ensure that federal spending does not reinforce discrimination in any location where federal dollars are spent. *Croson*, 488 U.S. at 490-492 (plurality); *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part).

Petitioner's reliance on *United States* v. *Morrison*, 529 U.S. 598 (2000), is thus misplaced. *Morrison* was concerned with whether Congress's creation of a federal remedy for gender-based violence was within Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment. This Court concluded that Congress could not create such a remedy under the Commerce Clause, because the remedy was for "noneconomic" violent crimes that have "always been the province of the States." *Id.* at 618-619. And the Court concluded that Congress could not rest the legislation on Section 5 of the Fourteenth Amendment because the Act was not directed at state actors. *Id.* at 626.

Unlike the legislation at issue in *Morrison*, TEA-21 falls squarely within the national government's enumerated powers, regardless of geographic scope. TEA-21 both authorizes the spending of federal funds for highway and mass transit projects and attaches conditions to that spending to achieve national goals. Congress has unquestioned authority under the Spending Clause, U.S. Const. Art. I, § 8, to "further broad policy objects by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Petitioner cites no authority for the novel proposition that Congress cannot further its interest in remedying discrimination by imposing conditions on its spending unless it finds that the evil of discrimination exists in a majority of States.

Legislation *mandating* the use of race-conscious remedies nationwide, even in regions where discrimination does not persist, would raise more difficult questions. But such concerns are best addressed through a narrow-tailoring analysis, not the compelling-interest inquiry. Pet. App. 27 n.10. In any event, such complaints have little place in the context of TEA-21 as implemented by DOT. Together, the statutory and regulatory provisions are designed to limit race-conscious remedies to *only* those jurisdictions where discrimination or its effects are a problem, and race-neutral relief is insufficient. See pp. 38-50, *infra*.

Indeed, for precisely that reason, petitioner is incorrect to assert (Br. 14, 18, 33-44) that the Department of Commerce's benchmark study demonstrates a lack of "congruence," *i.e.*, a failure to "match * * * the geographic area in which * * * discrimination is found, and the area in which the race-based solution is applied." To be sure, that study found no disparities in direct federal procurement of prime contractors for highway construction on federal lands in many jurisdictions.[16] In the context of direct federal procurement, however, the DOT *precludes* the use of race-based criteria *unless* the Department of Commerce's benchmark study finds disparities in the relevant market. 61 Fed. Reg. at 26,046-26,047; 48 C.F.R. 19.201(b); pp. 8-10, 21-22 & note 4, *supra*. Similarly, in the context of DOT's aid program, recipients are not authorized to use race-conscious remedies *unless* (among other things) localized analyses show underutilization of DBEs and the inadequacy of race-neutral relief suggesting the persistence of discrimination or its effects. See 49 C.F.R. 26.45, 26.51; pp. 5-6, *supra*. Thus, far from disproving geographic "congruence" as petitioner contends, the Department of Commerce's benchmark study and the similar local analyses required by DOT *ensure* it.

In any event, there is no requirement that Congress address only those problems that are both national in scope and

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[16] The Department of Commerce's benchmark study, moreover, examined only *direct federal procurement*—not procurement by States and localities using federal funds from the aid program—and it looked only for disparities in the government's hiring of *prime contractors*. When it comes to discrimination against subcontractors on federally aided projects in localized markets, the individual state studies and the Urban Institute study are a better source. See pp. 28-31, *supra*. In addition, the Department of Commerce's study found overwhelming evidence that the effects of discrimination persist in the *majority* of the approximately 70 industries and markets that compose all areas of federal procurement. 63 Fed. Reg. 35,714-35,715 (1998). Petitioner's assertion (Br. 34 n.23) that the study "disclaims any attempt to find the requisite intentional discrimination" is incorrect; the entire purpose of the study is to find disparities in utilization that are not explained by factors other than race.

of uniform incidence throughout the 50 States. Congress clearly has the power to address national problems like discrimination even if certain jurisdictions remain relatively free of such problems. Outside the spending context, for example, the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended, 42 U.S.C. 1973, establishes nationwide rules to ensure that racial discrimination does not impair the right to vote. Because the incidence of such discrimination is not uniform, moreover, Congress has established special rules for those jurisdictions that (based on statutorily identified practices or patterns) are of particular concern. See *Lopez* v. *Monterey County*, 525 U.S. 266, 269-270 (1999); *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 644, 645 n.3, 652 (1966). Nothing prevents Congress from exercising its spending powers to the same effect. Here, Congress and DOT struck a balance that allows Congress to address the national problem of discrimination, while *prohibiting* the use of race-conscious remedies on federally aided projects in jurisdictions where their necessity is not manifest.

B. DOT'S DBE PROGRAM IS NARROWLY TAILORED

Even when race-conscious measures serve a compelling interest, such measures must be narrowly tailored to that end. Petitioner has failed to show that the DBE program is incapable of being administered in a way that meets that narrow-tailoring requirement. DOT's regulations seek to channel remedial benefits to victims of discrimination and proscribe race-conscious measures unless race-neutral means of combating the effects of discrimination are insufficient. Aid recipients thus may use race-conscious remedies only as a last resort. 49 C.F.R. 26.51(a). The regulations further narrowly tailor the program by reserving remedies to those individuals who have confirmed, in a notarized document and subject to possible criminal prosecution, that they have been the victims of social and economic disadvantage; by limiting the geographic scope of remedies; and by limiting duration. The cumulative effect of those restrictions is to limit the use of race-conscious remedies to those situations

where the effects of discrimination are stubborn, persistent, and incapable of eradication through race-neutral measures.

1. *The DBE Program Seeks To Channel Remedial Benefits To Victims Of Discrimination*

DOT's regulations include a variety of features that channel relief to victims of discrimination. Before any remedial measure may be employed, the Secretary's regulations require federal-aid recipients to ascertain "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). This determination relies on the DBE certification process and is not a simple finding of racial under-representation. The state or local recipient of federal aid must look to the number of *DBEs* who are qualified in the relevant market, not the number of entities owned by members of particular races, and compare that to the total number of qualified businesses.

The DBE certification process, moreover, is designed to identify victims of discrimination, and not to classify individuals solely on the basis of race. Although minority-owned entities enjoy a statutory presumption that they qualify as DBEs, their owners must submit a notarized statement declaring that they are, in fact, socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1). They thus, in effect, must certify that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," which is the standard for social disadvantage, 15 U.S.C. 637(a)(5), *and* that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," which is the standard for economic disadvantage, 15 U.S.C. 637(a)(6)(A). An applicant for DBE certification, moreover, must submit documentation of its owner's personal wealth; if the owner's covered net worth exceeds $750,000, any presumption of disadvantage is conclusively rebutted. See 49 C.F.R. 26.67(a)(2), (b)(1). DBEs also must, on an annual basis, submit a sworn affidavit attesting that there have

been no material changes in circumstances affecting their eligibility. 49 C.F.R. 26.83(j). Likewise, aid recipients must include, as DBEs, businesses that are owned by non-minorities who have qualified for DBE status based on individual circumstances (*i.e.*, proof that they have been victims of discrimination). Finally, even a facially valid certification is rebuttable, 49 C.F.R. 26.67(b)(2), 26.87(a) and (c), and third parties may challenge eligibility by showing that the owner is not actually socially or economically disadvantaged, 49 C.F.R. 26.87. See also S. Rep. No. 4, *supra*, at 28 (presumption is rebuttable).

Those provisions contradict petitioner's claim that the program necessarily extends benefits, based on race alone, to individuals who have not suffered discrimination. As the district court explained in *Interstate Traffic Control* v. *Beverage*, 101 F. Supp. 2d 445, 453 (S.D. W. Va. 2000), the rebuttable presumption of disadvantage would permit an individual who has *not* actually suffered the effects of discrimination and impaired business opportunities to be certified as a DBE *only if* (1) that individual falsely declares that he has suffered disadvantage and (2) the inaccurate declaration goes unchallenged. Petitioner nowhere alleges that such errors are necessarily commonplace, and the possibility of such false declarations does not make the program facially invalid.

As a result, the DBE certification process itself reflects an effort to identify the effects of discrimination and to channel the remedial benefits to victims of discrimination. Furthermore, when recipients calculate the levels of DBE participation, they must consider available evidence to adjust those figures to account for the effect of other factors that might limit DBE participation, so that their estimates reflect the level of DBE participation that would be expected in the absence of discrimination. 49 C.F.R. 26.45(d). Unless that analysis indicates the need for remedial action, and race-neutral mechanisms are inadequate, no race-conscious relief is authorized.

2. *The DBE Program Permits Race-Conscious Measures Only Where Race-Neutral Corrections Are Insufficient*

"In determining whether race-conscious remedies are appropriate," this Court evaluates "the efficacy of alternative remedies." *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality). Because of the dangers inherent in race-conscious government action, the Court examines whether there has been "consideration of the use of race-neutral means," *Croson*, 488 U.S. at 507, and the extent to which opportunities can be made available "without classifying individuals on the basis of race," *id.* at 510 (plurality). See *Adarand I*, 515 U.S. at 237-238; *Croson*, 488 U.S. at 519 (Kennedy, J., concurring) (racial classifications permissible only "as a last resort"). Seizing on those requirements, petitioner declares that Congress failed to consider "even the obvious race neutral options" before enacting TEA-21. Pet. Br. 45. That is not correct: Congress repeatedly attempted to use race-neutral means to eliminate the effects of discrimination, but found such means inadequate. See Pet. App. 57 ("Adarand does not challenge [the district court's] finding, that Congress over a period of decades attempted to correct [the effects of discrimination] by race-neutral means" and "only after it continued to find discriminatory effects did it first implement a race-conscious remedy."). For example, although petitioner asserts (Br. 43) that Congress should have attempted to overcome discrimination in the provision of bonding by offering bonding assistance, Congress did just that in 1970 by establishing the Surety Bond Guarantee program, 15 U.S.C. 694a, 694b. Nonetheless, five years later, the General Accounting Office reported that the effect in "helping disadvantaged firms to become self-sufficient and competitive has been minimal." Congressional Research Service, Library of Congress, *Minority Enterprise and Public Policy* 53 (1977). The Secretary's DBE program, moreover, continues to require maximum use of race-neutral remedies, such as assistance in meeting bonding requirements, and race-conscious remedies may be invoked only as a last resort.

Only where there is a difference between anticipated DBE utilization and the levels of DBE use that would be expected absent discrimination under the above-described analysis are race-conscious corrections an option. See pp. 39-40, *supra*; 49 C.F.R. 26.45(b). See also 61 Fed. Reg. at 26,049 (in direct federal procurement, race may "be relied on *only* when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination" (emphasis added)). Moreover, even where that analysis suggests that the effects of discrimination persist, race-conscious measures *cannot* be employed *unless* race-neutral means are inadequate. "You must meet the maximum feasible portion of your overall goal," the DOT's regulations provide, "by using race-neutral means of facilitating DBE participation." 49 C.F.R. 26.51(a). See also 64 Fed. Reg. 5112 (1999) ("recipients have to give priority to race-neutral means"). The Justice Department's guidelines, which govern direct federal procurement, similarly declare that federal "agencies at all times" must "use race-neutral alternatives to the maximum extent possible." 61 Fed. Reg. at 26,049. Only "where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked." *Ibid.*

Consequently, petitioner's assertion that "[t]here is no evidence of" efforts to use race-neutral means like providing "financing for small firms," "relaxation of bonding requirements," or providing training "for disadvantaged entrepreneurs of all races," Pet. Br. 46, is simply an inaccurate characterization. Such efforts are explicitly required. Indeed, the regulations specifically mandate consideration of each of the race-neutral mechanisms that petitioner identifies, and require that those race-neutral benefits be made available to all small businesses, not just DBEs. Recipients must consider measures such as "assistance in overcoming limitations such as inability to obtain bonding or financing" by "simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from

bids, and providing services to help DBEs, *and other small businesses*, obtain bonding and financing," 49 C.F.R. 26.51(b)(2) (emphasis added); and they must consider offering small businesses "technical assistance," 49 C.F.R. 26.51(b)(3), and logistical and business support, 49 C.F.R. 26.51(b)(9).

The Secretary's regulations also identify numerous race-neutral means that petitioner does not mention. *E.g.*, 49 C.F.R. 26.51(b)(1) (arranging solicitations, bid presentation times, quantities and job sizes, specifications, and schedules to make it easier for small and new businesses to participate); 49 C.F.R. 26.51(b)(4) (ensuring dissemination of opportunities and guidelines to the relevant communities); 49 C.F.R. 26.29 (requiring prompt payment to all small businesses), and permit state and local recipients to develop their own. See also pp. 9-10, *supra* (describing similar requirements for direct federal procurement). In sum, DOT's regulations *require* recipients to consider the efficacy of the "array of race-neutral devices to increase the accessibility of contracting opportunities to small entrepreneurs of all races," *Croson*, 488 U.S. at 509 (plurality), and permit use of race-conscious mechanisms only as a last resort. In light of those limitations, petitioner cannot show that the regulations are incapable of constitutional application.

3. *The DBE Program Is Narrowly Tailored Through Flexibility, Proportionality, And Durational Limits*

"In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal," this Court considers duration, the relationship between any goals and the relevant pool of qualified entities, and the program's flexibility. *Paradise*, 480 U.S. at 187-188 (Powell, J., concurring). With respect to duration, this Court has explained that race-conscious remedies should "not last longer than the discriminatory effects [they are] designed to eliminate." *Adarand I*, 515 U.S. at 238. The Secretary's regulations and the terms of Congress's authorization for the DBE program impose such limits. As noted, race-conscious remedies are permissible only as a last resort. Whenever race-conscious

remedies are imposed as a last resort, recipients must eliminate or curtail them whenever it appears that race-neutral means will provide an adequate solution. 49 C.F.R. 26.51(f). The regulations thus require aid recipients constantly to reassess their programs to ensure that race-conscious remedies remain necessary.[17] Thus, as in direct federal procurement, the structure "is inherently limited" in the use of race-conscious measures." 61 Fed. Reg. at 26,049. As "barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds," the program should "automatically reduce, and eventually should eliminate, the use of race in decisionmaking." *Id.* at 26,048. The provisions of TEA-21 authorizing the DBE program, moreover, expire in fiscal year 2003, providing a built-in sunset unless Congress revisits the issue and finds sufficient grounds for renewing the program. In the interim, moreover, the program was the subject of study and review. 112 Stat. 107 (calling for GAO study).

The DBE program also provides narrow tailoring by requiring use of the "relevant statistical pool" in establishing DBE participation objectives, *Croson*, 488 U.S. at 501, and by mandating flexible implementation, *Paradise*, 480 U.S. at 187 (Powell, J., concurring). See also *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1576 (11th Cir. 1994). DOT DBE regulations require each recipient to set annual goals reflecting local business conditions; to set those goals based on the actual number of certified DBEs ready, willing, and able to compete in the recipient's market; and to ensure that the goal reflects the level of participation that would be expected absent discrimination. 49 C.F.R. 26.45; pp. 5-6, 39-40, *supra*. State and local recipients are explicitly directed that they cannot merely adopt the aspirational nationwide

[17] The eligibility of individual participants is also constantly reassessed. DBEs must annually submit an affidavit, swearing under penalty of perjury that there have been no changes in circumstances affecting their eligibility. 49 C.F.R. 26.83(j). As a result, the DBE size and personal net-worth limitations operate as durational limits on participation.

goal of ten-percent participation mentioned in TEA-21, or pursue a goal based on the racial composition of the local populace. 49 C.F.R. 26.41(c); 64 Fed. Reg. at 5107. Contrast *Croson*, 488 U.S. at 502 (rigid 30-percent quota unrelated to "how many MBE's in the relevant market are qualified").

Flexibility is also a hallmark of the DBE program. No penalty is imposed for failure to meet annual goals. 49 C.F.R. 26.47. When a recipient establishes goals for DBE participation for a particular contract, contractors need only pursue that goal in good faith; they are *not* required to achieve it. 49 C.F.R. 26.53(a). If a "bidder/offeror does document adequate good faith efforts," the State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2).

The regulations also strictly prohibit inflexible mechanisms like quotas. 49 C.F.R. 26.43. And the flexibility of the program is further enhanced through waiver provisions, under which a recipient may be relieved from complying with many if not most DBE regulations if it believes that equal opportunity can be achieved through other approaches, or if exceptional circumstances warrant a waiver. 49 C.F.R. 26.15. See 64 Fed. Reg. at 5096, 5102-5103.

4. *Congress's Use Of Racial And Ethnic Presumptions Is Not Fatally Over-Inclusive*

Petitioner's primary claim, in the end, is not that the entire program is overbroad. It is that the racial and ethnic presumption employed by TEA-21 in identifying socially and economically disadvantaged individuals is fatally over-inclusive because not every member of the identified races and ethnic groups is, in fact, socially and economically disadvantaged. Pet. Br. 41-43. That argument does isolate the one race-conscious aspect of the program that operates uniformly, without regard to local circumstances. But the argument ignores the fact that the presumption—as well as DBE certifications generally—are without *any effect* on third parties unless race-conscious remedies (like DBE contract goals) are employed. Because DOT regulations limit the use of race-conscious or DBE-specific remedies to those

markets where they are necessary, the impact of the statute's race-based presumption on parties like petitioner is sharply limited and narrowly tailored.

It is true, of course, that the race-based presumption operates when state and local recipients of federal aid (and the Department of Commerce) conduct analyses or studies to determine the level of DBE participation that would be expected absent discrimination. But the government has a responsibility to identify and remedy racial discrimination. See, *e.g.*, U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV, § 2. The government could not discharge that duty without using race-conscious mechanisms for identifying whether racial discrimination exists. Even the gathering of race-conscious data involves a degree of race-conscious government action that would be unnecessary in a perfectly color-blind world. But Congress clearly envisioned that race-based presumptions would aid in the identification of discrimination and its effects. The use of those criteria for that purpose, without more, does not implicate constitutional concerns, and DOT's regulations are written to *prevent* the use of race-conscious remedies that might affect third parties *unless* and *until* the need for such remedies has been identified.

Petitioner's argument also overlooks that the Secretary's implementing regulations seek to channel the benefits of participation to entities owned by individuals who in fact have suffered social and economic disadvantage, *i.e.*, to the victims of discrimination. Under DOT's regulations, the owners of firms seeking DBE designation must submit a notarized statement that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1); pp. 39-40, *supra*. Because any claim of disadvantage may be rebutted, moreover, the primary effect of the presumption is to allocate burdens of proof. Petitioner nowhere shows that shifting the burden of proof to the party opposing certification is inappropriate where the applicant for certification is a member of a group that, as a historical matter, has been

found by Congress or the Small Business Administration to have suffered and to suffer actual discrimination.

Petitioner charges that the notarized statement requirement is "essentially meaningless," Pet. Br. 10 n.6, and that it is invalid because it eliminates the presumption of disadvantage, *id.* at 41-42. Those contentions are in considerable tension with each other, and both are without merit. As to the former, DOT's regulations make it clear that DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants apparently take that warning seriously: In DOT's experience, the notarized statement requirement and net-worth limits have, since being implemented, affected both the number and identity of applicants. See also 61 Fed. Reg. at 26,045 ("The existence of a meaningful threat of prosecution for falsely claiming SDB status * * * will do much to ensure that the program benefits those for whom it is designed."). The speculative possibility that, on occasion, an undeserving individual will benefit, moreover, is no basis for invalidating the program. See *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 516 (1986). Besides, because petitioner brings a *facial* challenge, speculation about undetected fraud or errors in implementation is irrelevant; the program must be upheld unless it is *incapable* of constitutional implementation.

Petitioner's claim that the notarized statement requirement is inconsistent with the statutory presumption of disadvantage is also unpersuasive. First and foremost, the court of appeals never addressed the validity of the regulation, and petitioner would be the wrong party to challenge it. See Gov't Br. in Opp. 28. If DOT's regulations impermissibly deny contracting opportunities to wealthy minorities who have not suffered discrimination, then those wrongfully denied DBE status would be proper plaintiffs. Petitioner suffers no injury—indeed, could only benefit—from this alleged defect. Second, the presumption continues

to operate as a presumption notwithstanding the notarized statement requirement. An applicant for DBE certification who is not a member of the specified groups must demonstrate social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67. An applicant for DBE certification who is a member of the specified groups, in contrast, need not present detailed evidence to satisfy the certifying entity; he instead may rely on the presumption. That is the essence of a presumption.

The notarized statement, moreover, serves a different, non-evidentiary function: It prevents abuse and helps ensure that all applicants proceed in good faith. Nothing in the statutory presumption precludes the Secretary from imposing reasonable procedural requirements to deter bad-faith certification requests that, if challenged, would be rejected. And the statute certainly does not require the Secretary to implement the statute in a way that permits applicants to seek certification in bad faith. Nor does the filing of a notarized document prevent a challenge to a company's status as a DBE.

To be sure, DOT's regulations implement the statutory presumption in a manner that is designed to minimize the constitutional and policy concerns that would arise from an inflexible presumption that members of certain groups have suffered economic and social disadvantage. But for that reason, not only the traditional deference owed to the Secretary, *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), but also the canon favoring the construction that renders the statute constitutional, *Jones* v. *United States*, 526 U.S. 227, 239-240 (1999), support the Secretary's interpretation. Moreover, Congress was well aware of the Secretary's new regulations when it enacted TEA-21, see p. 13, *supra*, and its "repeated references" to the new regulations and their "modes of enforcement * * * justif[y] * * * presuming" that Congress did not view those regulations as contrary to its intent. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 697 (1979).

Petitioner's perceived need to attack the Secretary's implementation of the statutory presumption underscores that petitioner cannot meet its burden of demonstrating that the statutory DBE program is incapable of constitutional application. By limiting DBE status to those who certify that they are victims of discrimination in a notarized document, the Secretary's regulations tailor the broad statutory provisions to the requirements of the Constitution. The regulations are designed to employ race-conscious remedies for the limited purpose of remedying discrimination and its effects. If they fail in that objective, an injured party can bring an as-applied challenge. But petitioner should not be allowed to bring a facial challenge to the DBE program claiming that it is not narrowly tailored and then attack the very regulations that provide the narrow tailoring that petitioner claims is lacking.

Perhaps the most troubling aspect of any remedial scheme is that "innocent persons may" sometimes "be called upon to bear some of the burden of the remedy." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986) (plurality opinion). But the regulations at issue here are designed to minimize that burden so that it is not "'unacceptabl[y] substantial," *Paradise*, 480 U.S. at 182 (plurality). If the application of this program imposes undue hardships on a particular third party in a specific jurisdiction, that problem can be addressed in an as-applied challenge. But that *possibility* does not render the program unconstitutional on its face.

The current program is aimed at redressing the effects of discrimination. 64 Fed. Reg. at 5096 ("program is intended to remedy past and current discrimination against disadvantaged enterprises, ensure a 'level playing field' and foster equal opportunity in DOT-assisted contracts"). It is designed to ensure that aid recipients employ race-conscious remedies only as a last resort. Each recipient of TEA-21 funds sets and attains goals based on demonstrable evidence of the relative availability of ready, willing, and able DBEs in the areas from which it obtains contractors. 49 C.F.R. 26.45. Remedies are limited to those who can attest, in a

notarized document, that they are actual victims of discrimination and have suffered impaired opportunities as a result. And every effort is made to minimize the effect of necessary race-conscious remedies on innocent third parties. See, *e.g.*, 49 C.F.R. 26.33; p. 17, *supra*. The program thus is designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADARAND CONSTRUCTORS, INC., PETITIONER

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO THE BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

	Page
Appendix A: Relevant constitutional provisions	1a
Appendix B: Relevant provisions of the Transportation Equity Act for the 21st Century	2a
Appendix C: Section 8(d) of the Small Business Act, 15 U.S.C. 637(d)	8a
Appendix D: Relevant Department of Transportation Disadvantaged Business Enterprise Regulations, 64 Fed. Reg. 5127-5148 (1999), to be codified at 49 C.F.R. Pt. 26	18a
Appendix E: Relevant Federal Acquisition Regulations	72a
Appendix F: Department of Justice Guidelines for Affirmative Action, 61 Fed. Reg. 26,042-26,063 (1996)	101a
Appendix G: Selected Hearings and Reports, 1972-1995	190a
Appendix H: Hearings on the Surface Transportation Assistance Act of 1982	195a
Appendix I: Hearings and Reports in connection with ISTEA and TEA-21	196a
Appendix J: Department of Transportation, Federal Highway Administration, Central Federal Lands Highway Division, Colorado FH 60-2(2), West Dolores, Proposal and Contract (Proposal of Mountain Gravel & Construction Company)	198a

APPENDIX A

CONSTITUTIONAL PROVISIONS

1. The Spending Clause of the United States Constitution, U.S. Const. Art. 1, § 8, Cl. 1, provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

2. The Fifth Amendment to the United States Constitution, U.S. Const. Amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV, provides in pertinent part:

SECTION 1. * * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY

The Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Tit. I, § 1101, 112 Stat. 111, provides in pertinent part:

An Act

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

June 9, 1998
[H.R. 2400]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

TITLE I—FEDERAL AID HIGHWAYS

Subtitle A—Authorizations and Programs

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—The following sums are authorized to be appropriated out of the Highway Trust Fund (other than the Mass Transit Account):

* * * * *

(b) DISADVANTAGED BUSINESS ENTERPRISES.—

(1) GENERAL RULE.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business

concerns owned and controlled by socially and economically disadvantaged individuals.

(2) DEFINITIONS.—In this subsection, the following definitions apply:

(A) SMALL BUSINESS CONCERN.—The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $16,600,000, as adjusted by the Secretary for inflation.

(B) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS.—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

(3) ANNUAL LISTING OF DISADVANTAGED BUSINESS ENTERPRISES.—Each State shall annually survey and compile a list of the small business concerns referred to in paragraph (1) and the location of such concerns in the State and notify the Secretary, in writing, of the percentage of such concerns which are controlled by women, by socially and economically disadvantaged individuals (other than women), and by individuals who are women and are otherwise socially and economically disadvantaged individuals.

(4) UNIFORM CERTIFICATION.—The Secretary shall establish minimum uniform criteria for State governments to

use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include, but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, résumé of principal owners, financial capacity, and type of work preferred.

(5) COMPLIANCE WITH COURT ORDERS.—Nothing in this subsection limits the eligibility of an entity or person to receive funds made available under titles I, III, and V of this Act, if the entity or person is prevented, in whole or in part, from complying with paragraph (1) because a Federal court issues a final order in which the court finds that the requirement of paragraph (1), or the program established under paragraph (1), is unconstitutional.

(6) REVIEW BY COMPTROLLER GENERAL.—Not later than 3 years after the date of enactment of this Act, the Comptroller General of the United States shall conduct a review of, and publish and report to Congress findings and conclusions on, the impact throughout the United States of administering the requirement of paragraph (1), including an analysis of—

(A) in the case of small business concerns certified in each State under paragraph (4) as owned and controlled by socially and economically disadvantaged individuals—

(i) the number of the small business concerns; and

(ii) the participation rates of the small business concerns in prime contracts and subcontracts funded under titles I, III, and V of this Act;

(B) in the case of small business concerns described in subparagraph (A) that receive prime contracts and subcontracts funded under titles I, III, and V of this Act—

(i) the number of the small business concerns;

(ii) the annual gross receipts of the small business concerns; and

(iii) the net worth of socially and economically disadvantaged individuals that own and control the small business concerns;

(C) in the case of small business concerns described in subparagraph (A) that do not receive prime contracts and subcontracts funded under titles I, III, and V of this Act—

(i) the annual gross receipts of the small business concerns; and

(ii) the net worth of socially and economically disadvantaged individuals that own and control the small business concerns;

(D) in the case of business concerns that receive prime contracts and subcontracts funded under titles I, III, and V of this Act, other than small business concerns described in subparagraph (B)—

(i) the annual gross receipts of the business concerns; and

(ii) the net worth of individuals that own and control the business concerns;

(E) the rate of graduation from any programs carried out to comply with the requirement of paragraph (1) for small business concerns owned and controlled by socially and economically disadvantaged individuals;

(F) the overall cost of administering the requirement of paragraph (1), including administrative costs, certification costs, additional construction costs, and litigation costs;

(G) any discrimination on the basis of race, color, national origin, or sex against small business concerns owned and controlled by socially and economically disadvantaged individuals;

(H) (i) any other factors limiting the ability of small business concerns owned and controlled by socially and economically disadvantaged individuals to compete for prime contracts and subcontracts funded under titles I, III, and V of this Act; and

(ii) the extent to which any of those factors are caused, in whole or in part, by discrimination based on race, color, national origin, or sex;

(I) any discrimination, on the basis of race, color, national origin, or sex, against construction companies owned and controlled by socially and economically disadvantaged individuals in public and private transportation contracting and the financial, credit, insurance, and bond markets;

(J) the impact on small business concerns owned and controlled by socially and economically disadvantaged individuals of—

(i) the issuance of a final order described in paragraph (5) by a Federal court that suspends a program established under paragraph (1); or

(ii) the repeal or suspension of State or local disadvantaged business enterprise programs; and

(K) the impact of the requirement of paragraph (1), and any program carried out to comply with paragraph (1), on competition and the creation of jobs, including the creation of jobs for socially and economically disadvantaged individuals.

APPENDIX C

SECTION 8(D) OF THE SMALL BUSINESS ACT

Section 8(d) of the Small Business Act, 15 U.S.C. 637(d) (1994 & Supp. V 1999), as amended Pub. L. No. 106-554, § 1(a)(9) [Tit. VI, § 615(b), Tit. VIII, § 803], 114 Stat. 2763, 2763A-667, 2763A-701 to 2763A-703, provides in pertinent part:

(d) **Performance of contracts by small business concerns; inclusion of required contract clause; subcontracting plans; contract eligibility; incentives; breach of contract; review; report to Congress**

(1) It is the policy of the United States that small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which—

(A) does not exceed the simplified acquisition threshold;

(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(C) is for services which are personal in nature.

(3) The clause required by paragraph (2) shall be as follows:

"(A) It is the policy of the United States that small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women."

"(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

"(C) As used in this contract, the term 'small business concern' shall mean a small business as defined pursuant to section 3 of the Small Business Act [15 U.S.C. 632] and relevant regulations promulgated pursuant thereto. The term 'small business concern owned and controlled by socially and economically disadvantaged individuals' shall mean a small business concern—

"(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

"(ii) whose management and daily business operations are controlled by one or more of such individuals.

"The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C. 637(a)].

"(D) The term 'small business concern owned and controlled by women' shall mean a small business concern—

"(i) which is at least 51 per centum owned by one or more women; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more women; and

"(ii) whose management and daily business operations are controlled by one or more women.

"(E) The term 'small business concern owned and controlled by veterans' shall mean a small business concern—

"(i) which is at least 51 per centum owned by one or more eligible veterans; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more veterans; and

"(ii) whose management and daily business operations are controlled by such veterans. The contractor shall treat as veterans all individuals who are veterans within the meaning of the term under section 632(q) of this title.

"(F) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern, small business concern owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, a small business concern owned and controlled by socially and economically disadvantaged individuals, or a small business concern owned and controlled by women.

"(G) In this contract, the term 'qualified HUBZone small business concern' has the meaning given that term in section 632(p) of this Title."

(4)(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed $1,000,000, in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to con-

tracts awarded pursuant to the negotiated method of procurement.

(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts, and

(iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by veterans,

small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of the contract.

(E) Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection and for small business concerns owned and controlled by women, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: *Provided*, That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(F)(i) Each contract subject to the requirements of this paragraph or paragraph (5) shall contain a clause for the payment of liquidated damages upon a finding that a prime contractor has failed to make a good faith effort to comply with the requirements imposed on such contractor by this subsection.

(ii) The contractor shall be afforded an opportunity to demonstrate a good faith effort regarding compliance prior to the contracting officer's final decision regarding the imposition of damages and the amount thereof. The final decision of a contracting officer regarding the contractor's obligation to pay such damages, or the amounts thereof, shall be

subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(iii) Each agency shall ensure that the goals offered by the apparent successful bidder or offeror are attainable in relation to—

(I) the subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(II) the pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(III) the actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(G) The following factors shall be designated by the Federal agency as significant factors for purposes of evaluating offers for a bundled contract where the head of the agency determines that the contract offers a significant opportunity for subcontracting:

(i) A factor that is based on the rate provided under the subcontracting plan for small business participation in the performance of the contract.

(ii) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities,

shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include—

(A) percentage goals for the utilization as subcontractors of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small

business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; and efforts to identify and award subcontracts to such small business concerns.

(7) The provisions of paragraphs (4), (5), and (6) shall not apply to offerors or bidders who are small business concerns.

(8) The failure of any contractor or subcontractor to comply in good faith with—

(A) the clause contained in paragraph (3) of this subsection, or

(B) any plan required of such contractor pursuant to the authority of this subsection to be included in its contract or subcontract,

shall be a material breach of such contract or subcontract.

APPENDIX D

DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE REGULATIONS

The Department of Transportations Disadvantaged Business Enterprise Regulations, 64 Fed. Reg. 5127-5148 (1999), to be codified at 49 C.F.R. Pt. 26, provide in pertinent part:

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;

(b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;

(c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

(e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;

(f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and

(g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

§ 26.5 What do the terms used in this part mean?

* * * * *

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or DBE means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

* * * * *

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

§ 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award

and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

* * * * *

§ 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

§ 26.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may

differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

(ii) Your level of DBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of your modified program; and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting

§ 26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA recipients receiving funds authorized by a statute to which this part applies;

(2) FTA recipients that receive $250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year;

(3) FAA recipients that receive a grant of $250,000 or more for airport planning or development.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

* * * * *

§ 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor's work is satisfactorily completed.

(1) This clause may provide for appropriate penal ties for failure to comply, the terms and conditions of which you set.

(2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(b) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

§ 26.31 What requirements pertain to the DBE directory?

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

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Subpart C—Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§ 26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§ 26.45 How do recipients set overall goals?

(a) You must set an overall goal for DBE participation in your DOT-assisted contracts.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your

program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same SIC codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses

to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* Subject to the approval of the DOT operating administration, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming fiscal year;

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit you to express your overall goal as a percentage

of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year, unless the Administrator of the concerned operating administration establishes a different submission date.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

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§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating admini-

strations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

Example to Paragraph (f)(1): Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to Paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral

measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f)(3): Your overall goal for Year I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to Paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine

that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder /offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination

that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to

find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this sectión.

(g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

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Subpart D—Certification Standards

§ 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

§ 26.63 What rules govern group membership determinations?

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may re-

quire the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of $16.6 million. The Secretary adjusts this amount for inflation from time to time.

§ 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-

Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(ii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $750,000, the indi-

vidual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your

own certification proceeding, just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds $750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

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Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

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(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

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§ 26.83 What procedures do recipients follow in making certification decisions?

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) *Uniform form.* [Reserved]

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

* * * * *

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership,

or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you

fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

§ 26.85 What rules govern recipients' denials of initial requests for certification?

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation

required by paragraph (a) of this section is received by the firm.

(c) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population)

is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendancy of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(i) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(j) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a)(1) If you are a firm which is denied certification or whose eligibility is removed by a recipient, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 2401, Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

§ 26.91 What actions do recipients take following DOT certification appeal decisions?

(a) If you are the recipient from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

* * * * *

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

* * * * *

Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA,

recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles

of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

APPENDIX E

FEDERAL ACQUISITION REGULATIONS, 48 C.F.R. Pt. 19

1. Section 19.201 of Volume 48 of the Code of Federal Regulations, as amended 65 Fed. Reg. 60,542, 60,544 (2000), provides:

§ 19.201 General policy.

(a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

(b) The Department of Commerce will determine on an annual basis, by North American Industry Classification System (NAICS) Industry Subsector, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms and applicable factors (percentages). The Department of Commerce determination shall only affect solicitations that are issued on or after the effective date of the determination. The effective date of the Department of Commerce determination shall be no less than 60 days after its publication date. The Department of Commerce determination shall not affect ongoing acquisitions. The SDB procurement mechanisms are a price evaluation adjustment for SDB concerns (see Subpart 19.11), an evaluation factor or

subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203). The Department of Commerce determination shall also include the applicable factors, by NAICS Industry Subsector, to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The General Services Administration shall post the Department of Commerce determination at http://www.arnet.gov/References/sdbadjustments.htm. The authorized procurement mechanisms shall be applied consistently with the policies and procedures in this subpart. The agencies shall apply the procurement mechanisms determined by the Department of Commerce. The Department of Commerce, in making its determination, is not limited to the SDB procurement mechanisms identified in this section where the Department of Commerce has found substantial and persuasive evidence of—

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.

(c) Heads of contracting activities are responsible for effectively implementing the small business programs within their activities, including achieving program goals. They are to ensure that contracting and technical personnel maintain knowledge of small business program requirements and take all reasonable action to increase participation in their activities' contracting processes by these businesses.

(d) The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (see section (k) of the Small Business Act). Management of the office shall be the respon-

sibility of an officer or employee of the agency who shall, in carrying out the purposes of the Act—

(1) Be known as the Director of Small and Disadvantaged Business Utilization;

(2) Be appointed by the agency head;

(3) Be responsible to and report directly to the agency head or the deputy to the agency head;

(4) Be responsible for the agency carrying out the functions and duties in sections 8, 15, and 31 of the Small Business Act.

(5) Work with the SBA procurement center representative to—

(i) Identify proposed solicitations that involve bundling;

(ii) Facilitate small business participation as contractors including small business contract teams, where appropriate; and

(iii) Facilitate small business participation as subcontractors and suppliers where participation by small business concerns as contractors is unlikely;

(6) Assist small business concerns in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions;

(7) Have supervisory authority over agency personnel to the extent that their functions and duties relate to sections 8, 15, and 31 of the Small Business Act.

(8) Assign a small business technical advisor to each contracting activity within the agency to which the SBA has assigned a representative (see 19.402)—

(i) Who shall be a full-time employee of the contracting activity, well qualified, technically trained, and familiar with the supplies or services contracted for by the activity; and

(ii) Whose principal duty is to assist the SBA's assigned representative in performing functions and duties relating to sections 8, 15, and 31 of the Small Business Act;

(9) Cooperate and consult on a regular basis with the SBA in carrying out the agency's functions and duties in sections 8, 15, and 31 of the Small Business Act;

(10) Make recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded under subpart 19.5 as a small business set-aside, under subpart 19.8 as a Section 8(a) award, or under subpart 19.13 as a HUBZone set-aside.

(e) Small Business Specialists must be appointed and act in accordance with agency regulations.

(f)(1) Each agency shall designate, at levels it determines appropriate, personnel responsible for determining whether, in order to achieve the contracting agency's goal for SDB concerns, the use of the SDB mechanism in Subpart 19.11 has resulted in an undue burden on non-SDB firms in one of the Industry subsectors and regions identified by Department of Commerce following paragraph (b) of this section, or is otherwise inappropriate. Determinations under this subpart are for the purpose of determining future acquisitions and shall not affect ongoing acquisitions. Requests for a determination, including supporting rationale, may be submitted to the agency designee. If the agency designee makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination in con-

sultation with the Department of Commerce and the Small Business Administration. At a minimum, the following information should be included in any submittal:

(i) A determination of undue burden or other inappropriate effect, including proposed corrective action.

(ii) The Industry subsector affected.

(iii) Supporting information to justify the determination, including, but not limited to, dollars and percentages of contracts awarded by the contracting activity under the affected Industry subsector for the previous two fiscal years and current fiscal year to date for—

(A) Total awards;

(B) Total awards to SDB concerns;

(C) Awards to SDB concerns awarded contracts under the SDB price evaluation adjustment where the SDB concerns would not otherwise have been the successful offeror;

(D) Number of successful and unsuccessful SDB offerors; and

(E) Number of successful and unsuccessful non-SDB offerors.

(iv) A discussion of the pertinent findings, including any peculiarities related to the industry, regions or demographics.

(v) A discussion of other efforts the agency has undertaken to ensure equal opportunity for SDBs in contracting with the agency.

(2) After consultation with OFPP, or if the agency does not receive a response from OFPP within 90 days after notice is provided to OFPP, the contracting agency may limit the use of the SDB mechanism in Subpart 19.11 until

the Department of Commerce determines the updated price evaluation adjustment, as required by this section. This limitation shall not apply to solicitations that already have been synopsized.

2. Section 19.202-1 of Volume 48 of the Code of Federal Regulations provides:

§ 19.201-1 Encouraging small business participation in acquisitions.

Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

(a) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.

(b) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b.

(c) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government.

(d) Encourage prime contractors to subcontract with small business concerns (see subpart 19.7).

(e)(1) Provide a copy of the proposed acquisition package to the SBA procurement center representative at least 30 days prior to the issuance of the solicitation if—

(i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract;

(ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses can compete for the prime contract; or

(iii) The proposed acquisition is for a bundled requirement. (See 10.001(c)(2)(i) for mandatory 30-day notice requirement to incumbent small business concerns.)

(2) The contracting officer also must provide a statement explaining why the—

(i) Proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government;

(iii) Proposed acquisition cannot be structured so as to make it likely that small businesses can compete for the prime contract;

(iv) Consolidated construction project cannot be acquired as separate discrete projects; or

(v) Bundling is necessary and justified.

(3) The 30-day notification process shall occur concurrently with other processing steps required prior to the issuance of the solicitation.

(4) If the contracting officer rejects the SBA procurement center representative's recommendation, made in accordance with 19.402(c)(2), the contracting officer shall document the basis for the rejection and notify the SBA procurement center representative in accordance with 19.505.

3. Section 19.202-2 of Volume 48 of the Code of Federal Regulations, as amended 65 Fed. Reg. 60,542, 60,544 (2000), provides:

§ 19.202-2 Locating small business sources.

The contracting officer must, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in acquisitions by taking the following actions:

(a) Include on mailing lists all established and potential small business sources, including those located in labor surplus areas and HUBZones, if the concerns have submitted acceptable applications or appear from other representations to be qualified small business concerns.

(b) Before issuing solicitations, make every reasonable effort to find additional small business concerns, unless lists are already excessively long and only some of the concerns on the list will be solicited. This effort should include contacting the agency SBA procurement center representative, or if there is none, the SBA.

(c) Publicize solicitations and contract awards through the Governmentwide point of entry (see subparts 5.2 and 5.3).

4. Section 19.702 of Volume 48 of the Code of Federal Regulations, as amended 65 Fed. Reg. 60,542, 60,545 (2000), provides:

§ 19.702 Statutory requirements.

Any contractor receiving a contract for more than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(a) Except as stated in paragraph (b) of this section, Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:

(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, that individually is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bidding acquisitions, each invitation for bids to perform a contract or contract modification, that individually is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) above) are not required—

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; or

(4) For modifications to contracts within the general scope of the contract that do not contain the clause at 52.219-8, Utilization of Small Business Concerns (or equivalent prior clauses; e.g., contracts awarded before the enactment of Public Law 95-507).

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

(d) As authorized by 15 U.S.C. 637(d)(11), certain costs incurred by a mentor firm in providing developmental assistance to a Protege firm under the Department of Defense Pilot Mentor-Protege Program, may be credited as subcontract awards to a small disadvantaged business for the pur-

pose of determining whether the mentor firm attains a small disadvantaged business goal under any subcontracting plan entered into with any executive agency. However, the mentor-protege agreement must have been approved by the—

> Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), 1777 N. Kent Street, Suite 9100, Arlington, VA 22209

before developmental assistance costs may be credited against subcontracting goals. A list of approved agreements may be obtained at http://www.acq.osd.mil/sadbu/mentor_protege/ or by calling 1-800-553-1858.

5. Section 19.704 of Volume 48 of the Code of Federal Regulations, as amended 65 Fed. Reg. 60,542, 60,545 (2000), provides:

§ 19.704 Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include—

(1) Separate percentage goals for using small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. Service-disabled veteran-owned small business concerns meet the definition of veteran-owned small business concerns, and offerors may include them within the subcontracting plan goal for veteran-owned small business concerns. A separate goal for service-disabled veteran-owned small business concerns is not required;

(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of types planned for subcontracting to small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(4) A description of the method used to develop the subcontracting goals;

(5) A description of the method used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(7) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

(8) A description of the efforts the offeror will make to ensure that small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts;

(9) Assurances that the offeror will include the clause at 52.219-8, Utilization of Small Business Concerns (see 19.708(a)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $500,000 ($1,000,000 for construction) to adopt a plan that complies with the requirements of

the clause at 52.219-9, Small Business Subcontracting Plan (see 19.708(b));

(10) Assurances that the offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, following the instructions on the forms or as provided in agency regulations; and

(iv) Ensure that its subcontractors agree to submit SF 294 and SF 295; and

(11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master plan (see 19.701) that contains all the elements required by the clause at 52.219-9, Small Business Subcontracting Plan, except goals. Master plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master plans. Changes required to update master plans are not effective until approved by the contracting officer. A master plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(c) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by paragraph (a) of this section and shall contain separate statements and goals for the basic contract and for each option.

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The contractor shall—

(1) Submit the commercial plan to either the first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or, if the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period; and

(2) Submit a new commercial plan, 30 working days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. When the new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan.

6. Section 19.705-7 of Volume 48 of the Code of Federal Regulations, as amended 65 Fed. Reg. 60,542, 60,545 (2000), provides:

19.705-7 Liquidated damages.

(a) Maximum practicable utilization of small business, veteran-owned small business (including service-disabled veteran-owned small business), HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

(c) If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly. If the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or

longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business, veteran-owned small business (including service-disabled veteran-owned small business), HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following, though not all inclusive, may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small business, veteran-owned small business (including service-disabled veteran-owned small business), HUBZone small business, small disadvantaged business, or women-owned small business concerns; a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms or

as provided in agency regulations; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; or the adoption of company policies or procedures that have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

(f) With respect to commercial plans approved under the clause at 52.219-9, Small Business Subcontracting Plan, the contracting officer that approved the plan shall—

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, and document the results of the review;

(3) If a determination is made to assess liquidated damages, in order to calculate and assess the amount of damages, the contracting officer shall ask the contractor to provide—

(i) Contract numbers for the Government contracts subject to the plan;

(ii) The total Government sales during the contractor's fiscal year; and

(iii) The amount of payments made under the Government contracts subject to that plan that contributed to the contractor's total sales during the contractor's fiscal year; and

(4) When appropriate, assess liquidated damages on the Government's behalf, based on the pro rata share of subcontracting attributable to the Government contracts. For example: The contractor's total actual sales were $50 million and its actual subcontracting was $20 million. The Government's total payments under contracts subject to the plan contributing to the contractor's total sales were $5 million, which accounted for 10 percent of the contractor's total sales. Therefore, the pro rata share of subcontracting attributable to the Government contracts would be 10 percent of $20 million, or $2 million. To continue the example, if the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of $2 million, or $20,000. The contracting officer shall make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan.

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file a copy of the approved plan and a copy of the final decision assessing liquidating damages, if applicable.

7. Section 52.219-9 of Volume 48 of the Code of Federal Regulations, as amended 65 Fed. Reg. 60,542, 60,547 (2000), provides:

§ 52.219-9 Small business subcontracting plan.

As prescribed in 19.708(b), insert the following clause:

Small Business Subcontracting Plan (Oct. 2000)

(a) This clause does not apply to small business concerns.

(b) Definitions. As used in this clause—

Commercial item means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.

Commercial plan means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

Individual contract plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master plan means a subcontracting plan that contains all the required elements of an individual contract plan, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime [c]ontractor or subcontractor

calling for supplies or services required for performance of the contract or subcontract.

(c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract.

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. Service-disabled veteran-owned small business concerns meet the definition of veteran-owned small business concerns, and offerors may include them within the subcontracting plan goal for veteran-owned small business concerns. A separate goal for service-disabled veteran-owned small business concerns is not required. The offeror shall include all subcontracts that contribute to contract performance, and may include a pro-

portionate share of products and services that are normally allocated as indirect costs.

(2) A statement of—

(i) Total dollars planned to be subcontracted for an individual contract plan; or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan;

(ii) Total dollars planned to be subcontracted to small business concerns;

(iii) Total dollars planned to be subcontracted to veteran-owned small business concerns;

(iv) Total dollars planned to be subcontracted to HUBZone small business concerns;

(v) Total dollars planned to be subcontracted to small disadvantaged business concerns; and

(vi) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) HUBZone small business concerns;

(iv) Small disadvantaged business concerns; and

(v) Women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Marketing and Access Network (PRO-Net) of the Small Business Administration

(SBA), veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in PRO-Net as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of PRO-Net as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the offeror in [*sic*] included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) HUBZone small business concerns;

(iv) Small disadvantaged business concerns; and

(v) Women-owned small business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause of this contract entitled "Utilization of Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility) to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, in accordance with paragraph (j) of this clause. The reports shall provide information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, small disadvantaged business concerns, women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with the instructions on the forms or as provided in agency regulations.

(iv) Ensure that its subcontractors agree to submit SF 294 and SF 295.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (e.g., PRO-Net), guides, and other data that identify small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than $100,000, indicating—

(A) Whether small business concerns were solicited and, if not, why not;

(B) Whether veteran-owned small business concerns were solicited and, if not, why not;

(C) Whether HUBZone small business concerns were solicited and, if not, why not;

(D) Whether small disadvantaged business concerns were solicited and, if not, why not;

(E) Whether women-owned small business concerns were solicited and, if not, why not; and

(F) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact—

(A) Trade associations;

(B) Business development organizations;

(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, and women-owned small business sources; and

(D) Veterans service organizations.

(v) Records of internal guidance and encouragement provided to buyers through—

(A) Workshops, seminars, training, etc.; and

(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small business, veteran-owned small

business, HUBZone small business, small disadvantaged business, and women-owned small business firms.

(4) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, veteran-owned small business, HUBZone small, small disadvantaged, or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(f) A master plan on a plant or division-wide basis that contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided—

(1) The master plan has been approved,

(2) The offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including evidence of its approval, to the Contracting Officer, and

(3) Goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Commercial plans are also preferred for subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item.

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization Of Small Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.

(j) The Contractor shall submit the following reports:

(1) Standard Form 294, Subcontracting Report for Individual Contracts. This report shall be submitted to the Contracting Officer semi-annually and at contract completion. The report covers subcontract award data related to this contract. This report is not required for commercial plans.

(2) Standard Form 295, Summary Subcontract Report. This report encompasses all of the contracts with the awarding agency. It must be submitted semi- annually for contracts with the Department of Defense and annually for contracts with civilian agencies. If the reporting activity is covered by a commercial plan, the reporting activity must report annually all subcontract awards under that plan. All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a breakout, in the Contractor's format, of subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.

(End of clause)

Alternate I (Oct 2000). When contracting by sealed bidding rather than by negotiation, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the bidder is submitting an individual contract plan, the plan must separately address subcontracting with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

Alternate II (Oct 2000). As prescribed in 19.708(b)(1), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) Proposals submitted in response to this solicitation shall include a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business, veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The

subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the offeror ineligible for award of a contract.

APPENDIX F

DEPARTMENT OF JUSTICE GUIDELINES FOR AFFIRMATIVE ACTION

The Department of Justice Proposed Rules governing Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042-26,063 (1996), provide in pertinent part:

DEPARTMENT OF JUSTICE

Proposed Reforms to Affirmative Action in Federal Procurement

* * * * *

SUMMARY: The proposal set forth herein to reform affirmative action in federal procurement has been designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). The proposed structure, which has been developed by the Justice Department, will form a model for amending the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.

* * * * *

Introduction

In *Adarand*, the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling government interest.

Through its initial authorization of the use of section 8(a) of the Small Business Act to expand opportunities for minority-owned firms and through reenactments of this and other programs designed to assist such businesses, Congress has repeatedly made the judgment that race-conscious federal procurement programs are needed to remedy the effects of discrimination that have raised artificial barriers to the formation, development and utilization of businesses owned by minorities and other socially disadvantaged individuals. In repeated legislative enactments, Congress has, among other measures, established goals and granted authority to promote the participation of Small Disadvantaged Businesses (SDBs) in procurement for the Department of Defense, NASA and the Coast Guard. It also enacted the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987 and the Intermodal Surface Transportation Efficiency Act of 1991, each of which successively authorized a goal for participation by Disadvantaged Business Enterprises. Congress also included similar provisions in the Airport and Airway Improvement Act of 1982 with respect to procurement regarding airport development and concessions. Under Section 15(g) of the Small Business Act, 15 U.S.C. 644(g), Congress has established goals for SDB participation in agency procurement. Finally, in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which extended generally to federal agencies authority to conduct various race-conscious procurement activities. The purpose of this measure was to facilitate the achievement of goals for SDB participation established for agencies pursuant to Section 15(g) of the Small Business Act.

Based upon these congressional actions, the legislative history supporting them, and the evidence available to Congress, this congressional judgment is credible and constitutionally defensible. Indeed, the survey of currently available evidence conducted by the Justice Department since the *Adarand* decision, including the review of numerous specific studies of discrimination conducted by state and local governments throughout the nation, leads to the conclusion that, in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period. For purposes of these proposed reforms, therefore, the Justice Department takes as a constitutionally justified premise that affirmative action in federal procurement is necessary, and that the federal government has a compelling interest to act on that basis in the award of federal contracts.[1]

Subject to certain statutory limitations (that are discussed below), Congress has largely left to the executive agencies the determination of how to achieve the remedial goals that it has established. The Court in *Adarand* made clear that, even when there is a constitutionally sustainable compelling interest supporting the use of race in decisionmaking, any such programs must be narrowly tailored to meet that interest. We have focused, therefore, on ensuring that the means of serving the congressionally mandated interest in this area are narrowly tailored to meet that objective. This task must be taken very seriously. *Adarand* made clear that Congress has the authority to use race-conscious decisionmaking to remedy the effects of past and present discrimination but emphasized that such decisionmaking must be done carefully. This Administration is committed to ensuring that discriminatory barriers to the opportunity of minority-owned firms are eliminated and the maximum opportunities possible under the law are maintained. Our

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[1] Set forth as an appendix to this notice is a preliminary survey of evidence establishing the compelling interest for affirmative action in federal procurement.

focus, therefore, has been on creating a structure for race-conscious procurement that will meet the congressionally determined objective in a manner that will survive constitutional scrutiny.

In giving content to the narrow tailoring prong of strict scrutiny, courts have identified six principal factors: (1) Whether the government considered race neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the program and whether it is flexible; (3) whether race is relied upon as the sole factor in eligibility, or whether it is used as one factor in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether it is subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries of the program. Not all of these factors are relevant in every circumstance and courts generally consider a strong showing with respect to most of the factors to be sufficient. This proposal, however, responds to all six factors.

The Department of Defense (DoD), which conducts a substantial majority of the federal government's procurement, was the focus of initial post-*Adarand* compliance actions by the federal government. In particular, DoD, acting pursuant to authority granted by 10 U.S.C. § 2323,[2] had developed

[2] Section 2323 establishes a five percent goal for DoD contracting with small disadvantaged businesses ("SDBs") and authorizes DoD to "enter into contracts using less than full and open competitive procedures * * * and partial set asides for [SDBs]." Section 2323 states that the cost of using such measures may not exceed fair market price by more than ten percent. It authorizes the Secretary of Defense to adjust the applicable percentage "for any industry category if available information clearly indicates that nondisadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph."

through regulation a practice known as the "rule of two." Pursuant to the rule of two, whenever a contract officer could identify two or more SDBs that were qualified to bid on a project at a price within 10% of fair market price, the officer was required to set the contract aside for bidding exclusively by SDBs. Under section 2323, firms owned by individuals from designated racial minority groups are presumed to be SDBs.[3] Others may enter the program by establishing that they are socially and economically disadvantaged. After consultation with the Department of Justice, DoD suspended use of the rule of two in October 1995.

Congress in 1994 extended the affirmative action authority granted DoD by section 2323 to all agencies of the federal government through enactment of the Federal Acquisition Streamlining Act (FASA), Public Law No. 103-355, sec. 7102, 108 Stat. 3243, 15 U.S.C. 644 note.[4] Because of *Adarand* and the effort to review federal affirmative action programs in light of that decision, regulations to implement the affirma-

[3] 10 U.S.C. 2323 incorporates by explicit reference the language of section 8(d) of the Small Business Act, which states that members of designated racial or ethnic groups are presumed to be socially and economically disadvantaged. Participants in the 8(a) program are also presumed to be SDBs.

[4] FASA states that in order to achieve goals for SDB participation in procurement negotiated with the Small Business Administration, an "agency may enter into contracts using—(A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and (B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation."

tive action authority granted by FASA have been delayed. See 60 Fed. Reg. 448258, 48259 (Sept. 18, 1995). This proposal provides the basis for those regulations.

The proposed structure will necessarily affect a wide range of measures that promote minority participation in government contracting through race-conscious means. Taking DoD as an example, approximately one-sixth of contracting with minority-owned firms in 1994 resulted from use of the rule of two. The majority of dollars to minority firms was awarded by DoD through other means: direct competitive awards, the Small Business Administration's (SBA) section 8(a) program, subcontracting pursuant to section 8(d) of the Small Business Act, and a price credit applied pursuant to section 2323. With the exception of direct competitive awards (which do not take race into account), activities pursuant to all of these methods will be affected by the proposed reforms.[5]

The 8(a) program merits special mention at the outset. This program serves a purpose that is distinct from that served by general SDB programs. The 8(a) program is designed to assist the development of businesses owned by socially and economically disadvantaged individuals. To this end, the program is targeted toward concerns that are more disadvantaged economically than other SDBs (*e.g.*, the standard for economic disadvantage for entry into 8(a) is an

[5] This proposal addresses only affirmative action in the federal government's own direct procurement. It does not address affirmative action in procurement and contracting that is undertaken by states and localities pursuant to programs in which such entities receive funds from federal agencies (*e.g.*, the Disadvantaged Business Enterprise program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, section 1003(b), 105 Stat. 1919-1922, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, *et seq.*).

owner's net worth of $250,000 compared to $750,000 for SDB programs). Participants in the program are required to establish business development plans and are eligible for technical, financial, and practical assistance, and may compete in a sheltered market for a limited time before graduating from the program. Each of these aspects of the program is designed to assist the business in developing the technical and practical experience necessary to become viable without assistance. By contrast, the general SDB program is a procurement program, designed to assist the government in finding firms capable of providing needed services, while, at the same time, helping to address the traditional exclusion of minority-owned firms from contracting opportunities.

The operation of the 8(a) program will become subject to the overall limitations in the measures described below. In addition, the SBA is working to strengthen safeguards against fraud and to ensure that the 8(a) program serves its purpose of assisting the development of businesses owned by individuals who are socially and economically disadvantaged.

Because the proposed reforms are broad and cover a number of different subjects related to affirmative action in federal procurement, the Justice Department is seeking comments on each of the aspects of the proposal. Comments will be taken into account in the formulation of revised procurement regulations.

Overview of Structure

The SDB reform outlined herein involves five major topics: (1) Certification and eligibility; (2) benchmark limitations; (3) mechanisms for increasing minority opportunity; (4) the interaction of benchmark limitations and mechanisms; and (5) outreach and technical assistance. The proposed structure incorporates these elements into a system that furthers the President's commitment to ensuring equal

opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority.

I. Eligibility and Certification

At present, while a concern must have its eligibility certified by the SBA to participate in the 8(a) program, there is no similar certification requirement for participation in SDB programs. Under current practice, firms simply check a box to identify themselves as SDB's when bidding for federal contracts or 8(d) subcontracts. Reform of this certification process is needed to assure that programs meet constitutional and statutory objectives. While the basic elements of eligibility under these programs are statutorily determined, agencies have discretion to impose significant additional controls and to establish mechanisms to assure that the statutory criteria are in fact met.

The SBA will continue as the sole agency with authority to certify firms for the 8(a) program. The following discussion, therefore, concerns only certification of SDB's that are not participants in the 8(a) program.

Each bid that an SDB submits to an agency, or to a prime contractor seeking to fulfill 8(d) subcontracting obligations, will have to be accompanied by a form certifying that the concern qualifies as a small disadvantaged business under eligibility standards that will be published by the SBA. The standards and certification form will allow 8(a) participants to qualify automatically for SDB programs. Others will be required to establish their eligibility by submitting required statements and documentation.

When a concern has been certified by an agency as eligible for SDB programs, its name will be entered into a central on-line register to be maintained by SBA. That certification will be valid for a period of up to three years during which time registered firms will have only to complete a portion of

the form confirming the continued validity of that certification to participate in SDB programs at any agency. A full application will have to be submitted to an agency every three years to maintain eligibility.

A. Social and Economic Disadvantage

Members of designated minority groups seeking to participate in SDB and 8(d) programs will continue to fall within the statutorily mandated presumption of social and economic disadvantage.[6] This presumption is rebuttable as to both forms of disadvantage. The form will ask the applicant to identify the group identification triggering a presumption of social and economic disadvantage.[7] In addition, the form will enumerate the objective criteria constituting economic disadvantage according to SBA standards and advise the applicant that the presumption of such disadvantage is rebuttable and any challenge to the individual's SDB status will be resolved on the basis of these criteria. Challenges would be processed through existing SBA challenge mechanisms.

Individuals who do not fall within the statutory presumption will be required to establish social and economic disadvantage by answering a series of questions demonstrating such disadvantage. Questions regarding social disadvantage will be included in the standard certification form. Pursuant to current practice, individuals who do not fall

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[6] Both FASA and 10 U.S.C. 2323 incorporate by explicit reference the definition of social and economic disadvantage contained in section 8(d) of the Small Business Act. Pursuant to section 8(d), members of designated groups are presumed to be both socially and economically disadvantaged; those presumptions are rebuttable. By contrast, for the 8(a) program, members of identified groups are rebuttably presumed to be socially disadvantaged, but must establish that they are economically disadvantaged.

[7] Members of minority groups do not have to participate in the SDB program in order to bid on federal contracts.

within a presumption must prove their social disadvantage by clear and convincing evidence. That standard will be changed to permit proof by a preponderance of the evidence.

The SBA currently has criteria for evaluating social disadvantage. SBA will conduct training seminars designed to instruct personnel from other agencies on the procedures for making eligibility determinations. Individuals who do not fall within the statutory presumption will also be required to demonstrate that they are economically disadvantaged according to the criteria established by SBA.

Agencies will have discretion to decide which official within the agency will have authority to determine whether "non-presumed" individuals are socially and economically disadvantaged.[8] In most instances, the contracting officer should not have final authority to make the determination; the procedure must, however, facilitate quick decisions so that the procurement process will not be delayed and applicants will have a fair opportunity to compete. An agency may wish to assign this responsibility to its Office of Small and Disadvantaged Business Utilization. The SBA will answer inquiries regarding eligibility determinations and the procuring agency will retain the ability to refer applications to the SBA for final eligibility determinations through the protest procedures now in place. In the alternative, an agency may enter into an agreement with SBA to have SBA make all determinations, including the initial determination of eligibility.

[8] The form that such individuals are to complete will ask whether they previously have applied for SDB certification and been rejected or accepted. A rejected firm will not be permitted to re-apply for certification for one year after rejection, unless it can show changed circumstances.

B. Ownership and Control

In addition to submitting the form described above, every applicant will be required to submit with each bid a certification that the business is owned and controlled by the designated socially and economically disadvantaged individuals as those terms are defined by the SBA's standards for ownership and control at 13 C.F.R. 124.103 and 124.104.[9] Such a certification must come from an SBA approved organization, a list of which will be maintained by the SBA. In order to be approved by the SBA to certify ownership and control, (1) the entity must certify ownership and control according to the standards established by the SBA for the 8(a) program (13 C.F.R. 124.103 and 124.104); (2) the entity's certifications must have been accepted by a state or local government or a major private contractor; and (3) the entity must not have been disqualified by any government authority from making certifications within the past five years. Such entities may include private organizations, the SBA (*i.e.*, through the 8(a) program), entities that provide certifications for participation in the Department of Transportation's disadvantaged business enterprise ("DBE") program, or states or localities, so long as the certification addresses the standards for ownership and control promulgated by the SBA.

This procedure is intended to take advantage of the extensive network of certifying entities already in existence. At present, firms may have to obtain several different certifica-

[9] The standard certification form will accommodate one eligibility criterion peculiar to the DoD's SDB program under 10 U.S.C. 2323—that the majority of earnings must directly accrue to the socially and economically disadvantaged individuals that own and control the concern. The standard certification form will accommodate this criterion by including a DoD-specific section requiring the concern to attest that the majority of the firm's earnings do flow in this manner.

tions as they pursue a mix of private and public contracts. While it is clear that a control mechanism is needed to protect against fraud, it makes little sense to create a new federal bureaucracy to perform work that is already being done and to erect another hurdle that an SDB must clear before qualifying for a federal contract. The limited resources of the federal government and of SDBs make creation of such a bureaucracy counterproductive.

To police the quality of certifications, SBA will conduct periodic audits of certifying organizations. Any entity may submit information to the SBA in an effort to persuade the agency to initiate such an audit.

As a means of ensuring that the identified socially and economically disadvantaged individuals retain ownership and control of a firm, a certification of ownership and control will be valid for a maximum of three years from the date it was issued. Certified firms will be required to recertify their eligibility by submitting a full application, including an updated certification of ownership and control, every three years.

C. Challenges

Where an SDB is the apparent successful offeror on a contract, the name of that firm and of the entity that certified its ownership and control will be a matter of public record. SBA regulations currently allow any concern that submitted an offer to protest the eligibility of an SDB that receives a contract through an SDB program. The procuring agency or SBA may also protest the eligibility of an SDB. Individuals or organizations that did not submit a bid for the contract in question may submit information to the procuring agency in an effort to convince the agency to initiate a

protest.[10] The SBA's Division of Program Certification and Eligibility will process any protest that contains specific factual allegations that the concern is not eligible for the program.

Grounds for an eligibility protest may include, but are not limited to, evidence that:

- The owners of the firm are not in fact socially or economically disadvantaged;
- The firm is not owned and controlled by the individuals who meet the definition of social and economic disadvantage;
- The disadvantaged firm has acted, or is acting, as a front company by failing to complete required percentages of the work contracted to the concern.[11]

Upon receiving a protest supported by specific factual information, the SBA will make an eligibility determination by examining documentation from the SDB including, for example, personal and business financial statements, business records, ownership certifications, and other information deemed necessary to permit a determination as to the eligibility of the firm. Current regulations require the SBA to make a determination concerning the eligibility of

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[10] The protests contemplated in the discussion here relate only to certification and eligibility. The discussion does not relate to protests to other features of the proposed reforms that might be raised through existing bid protest procedures or through actions under the Administrative Procedure Act.

[11] The basis for such a challenge would be 48 C.F.R. 19.508, which requires completion of a minimum percentage of contract activities by the firm awarded a contract through a small business set aside or the 8(a) program. A clause must be inserted in such contracts that limits the amount of work that can be subcontracted. 48 C.F.R. 52.219-14. These requirements will be expanded to include contracts awarded through the reformed SDB program as well.

the firm within 15 days of the filing of the challenge or notify the contracting officer of any delay.

D. Enforcement

Finally, there must be a concerted effort to enforce the law against individuals who present fraudulent information to the government. The existence of a meaningful threat of prosecution for falsely claiming SDB status, or for fraudulently using an SDB as a front in order to obtain contracts, will do much to ensure that the program benefits those for whom it is designed. To this end, there will be an enhanced effort by SBA and the Department of Justice to identify and pursue individuals fraudulently misrepresenting information in order to obtain contracts through an SDB program. Any individual may forward specific factual information suggesting such a misrepresentation to the procuring agency contracting officer or the agency's inspector general. Similarly, the Inspector General of SBA will refer evidence of misrepresentation that emerges through the challenge procedure or otherwise to the Department of Justice. In its enforcement, the Department of Justice will ensure that it pursues to the extent permitted by law all of the parties responsible for fraudulent or sham transactions.

Penalties for misrepresentations in this area were increased by the Business Opportunity Development and Reform Act of 1988 and include:

(1) A fine of up to $500,000, imprisonment of up to 10 years, or both;

(2) Suspension and debarment from Federal contracting (48 C.F.R. pt. 9.4);

(3) Ineligibility to participate in any program or activity conducted under the authority of the Small Business Act or

the Small Business Investment Act of 1958 for a period of up to three years; and

(4) Administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Knowing and willful fraudulent statements or representations may subject an individual to criminal penalties, including imprisonment for up to five years, pursuant to 18 U.S.C. 1001. In addition, knowing misrepresentations to obtain payment from the federal government may violate the False Claims Act, 31 U.S.C. 3729, and subject the claimant to civil penalties and treble damages.

II. Benchmark Limits

Although Congress has made the judgment that affirmative race-conscious measures are needed in federal contracting, the use of race must be narrowly tailored. The federal government operates under a general statutory mandate to achieve the "maximum practical opportunity" for SDB participation and that overall mandate is translated into specific agency-by-agency goals. Some specific programs operate under statutorily prescribed goals.[12] To the extent that race-conscious measures (going beyond outreach and technical assistance) are utilized to obtain these objectives, limitations must be established to comply with narrow tailoring requirements.

To this end, the proposal relies on development of a set of specific guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of federal procurement. The limits, or "benchmarks", will be set for each in-

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[12] See, *e.g.*, 10 U.S.C. 2323 (5% goal for DoD contracting with SDBs); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (10% goal for highway construction projects carried out directly by the Department of Transportation).

dustry for the entire government. The Department of Commerce, in consultation with the General Services Administration (GSA) and SBA, will establish appropriate benchmark limitation figures for each industry and report them to the Office of Federal Procurement Policy (OFPP), which will publish and disseminate the final benchmark figures. Each industry benchmark limitation will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects. Benchmark limitations will provide the basis for comparison with actual minority participation in procurement in that industry (and, where appropriate, in a region).

In establishing the benchmark limitations, the first step is to define whether industries operate according to regional or national markets. In general, industries will be defined according to two-digit Standard Industrial Classification (SIC) codes. Based on the evidence, it appears that most federal contracting is conducted on a national basis. We also start from the view, reflected in a variety of federal policies, that federal contracting should encourage the development of national markets wherever feasible. Where data indicate, however, that an industry operates regionally, the benchmark limitations will be established by region.

After identifying the markets, the system will then measure, using primarily census data, the capacity of firms operating in each market that are owned by minorities. In estimating capacity, a number of factors will be examined. Most significant, of course, will be the number of minority SDBs available and qualified to perform government contracts.[13] In general, it appears appropriate to look at the

[13] For these purposes, the calculation of the number of minority-owned firms will not include corporations owned by federally-recognized Native American tribes and Alaskan Native villages. Bidding credits for such corporations are not subject to the *Adarand* strict scrutiny standard.

industry in question and identify the smallest firm that has won a government contract in that industry in the last three years. Firms that are significantly smaller would be presumed to be unqualified to perform government contracts in that industry. While keeping in mind that capacity is not fixed, it will also be important to look at measures such as the number of employees and amount of revenues.

In addition to calculating the capacity of existing minority firms, the proposed system will examine evidence, if any, demonstrating that minority business formation and operation in a specific industry has been suppressed by discrimination. This evidence may include direct evidence of discrimination in the private and public sectors in such areas as obtaining credit, surety guarantees and licenses. It may also include evidence of discrimination in pricing and contract awards. In addition, the evidence may include the results of regression analysis techniques similar to those used in state studies of discrimination in procurement. That form of analysis holds constant a variety of variables that might affect business formation so that the effect of race can be isolated.

The combination of existing minority capacity and, where applicable, the estimated effect of race in suppressing minority business activity in the industry will form the benchmark limitation. Although there is no absolutely precise way to calculate the impact of discrimination in various markets, the benchmark limitations represent a reasonable effort to establish guidelines to limit the use of race-conscious measures and to meet the requirement that such measures be narrowly tailored to accomplish the compelling interest that Congress has identified in this area.

Benchmark limitations will be adjusted every five years, as new data regarding minority firms are made available by

the Census Bureau. Generally, census regions will be used indefining the scope of regional markets.

III. Mechanisms for Increasing Minority Opportunity

Under the reformed structure, the federal government will generally have authority, subject to the limitations discussed in the next section, to use several race-conscious contracting mechanisms: SBA's 8(a) program; a bidding credit for SDB prime contractors; and an evaluation credit for non-minority prime contractors that use SDBs in subcontracting. In addition, at all times, agencies must engage in a variety of outreach and technical assistance activities designed to enhance contracting opportunities for SDBs (but that are not subject to strict scrutiny). Those efforts will be expanded as described more fully below.

The 8(a) program will continue to provide for sole source contracting and sheltered competition for 8(a) firms. However, the program will be monitored; and where the benchmark limitations described more fully below warrant adjustments to the SDB program, corresponding adjustments will be made to the 8(a) program to ensure that its operation is subject to those limitations.

A second available race-conscious measure will be a bidding credit in prime contracting for SDBs. Statutory authority for the use of such a credit exists for DoD in 10 U.S.C. 2323 and for the remainder of the government in FASA. Each statute permits use of such a credit so long as the final price does not exceed a fair market price by more than 10%.

The use of the term "credit" is not meant to restrict utilization by agencies of this mechanism to contracts where price is the primary factor in selecting the successful bidder. Where the successful bidder is selected based on other factors—such as the ability to produce a contract that provides the "best value" to the agency—agencies may build

the value of increasing the participation of SDB contractors into the evaluation of offers. For some contracts, a numerical credit may be appropriate; in others, some form of non-numerical assignment may make more sense to the agency. This proposal does not restrict such options. However, regardless how it operates, any bidding credit will be subject to the overall limitations on race-conscious mechanisms described herein.

Pursuant to 10 U.S.C. 2323 and FASA, agencies will also be permitted to use, as a third race-conscious mechanism, an evaluation credit with respect to the utilization by non-minority prime contractors of SDBs as subcontractors. Such goals would be set by the agency for each prime contract based on the availability of minority firms to perform the work. The award of evaluation credits for prime contractors that use SDBs as subcontractors will supplement the existing statutory SDB subcontracting requirements in Section 8(d) of the Small Business Act.[14] In order to certify their eligibility as SDBs, subcontractors will submit the same certification form to the prime contractor that is described in the certification section of this proposal.

Such an evaluation credit can take a number of different forms, depending on the circumstances of a solicitation.[15] For example, where it is practical for bidders to secure enforceable commitments from SDB subcontractors prior to

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[14] For certain types of procurement, Section 8(d) requires agencies to negotiate an SDB subcontracting plan with the successful bidder for the prime contract. The statute provides that each such plan shall include percentage goals for the utilization of SDB subcontractors.

[15] As was the case with respect to the use of the term "credit" in connection with bids from SDBs as prime contractors, the use of that term here in connection with SDB subcontracting is not intended to restrict the utilization of this mechanism to the evaluation of prime contract bids for which price is the primary factor in selecting the successful bidder.

the submission of bids, agencies should establish an SDB subcontracting goal for the contract, and award an evaluation credit to bidders who demonstrate that they have entered into such commitments as a means of achieving the goal. Where that is not practical, agencies can award an evaluation credit to a bidder that specifically identifies in a subcontracting plan those SDB subcontractors that it intends to use to achieve the agency's SDB subcontracting goal.[16] Agencies may also award an evaluation credit based on demonstrable evidence of a bidder's past performance in using SDB subcontractors. Agencies may also grant bonus awards to prime contractors to encourage the use of SDB subcontractors.[17] This proposal is not intended to limit agencies in developing or using additional mechanisms to increase SDB subcontracting, but any such mechanism will be subject to the limitations on race-conscious mechanisms described herein.

In applying these bidding and evaluation credits, race will simply be one factor that is considered in the decision to award a contract—in contrast to programs in which race is the sole factor.

IV. Interaction of Benchmark Limits and Mechanisms

In determining how benchmark limitations will be used to measure the appropriateness of various forms of race-conscious contracting, the objective has been to develop a sys-

[16] In either case, a successful prime contractor should notify the contracting officer of any substitution of a non-SDB subcontractor for an SDB firm with which the prime contractor had entered into enforceable commitments or that had been specifically identified in the prime contractor's subcontracting plan.

[17] See, *e.g.*, Department of Transportation Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns, 48 C.F.R. 52.219-10.

tem that can operate with a sufficient degree of clarity, consistency and simplicity over the range of federal agencies and contracting activities. Where the use of all available tools, including direct competition and race-neutral outreach and recruitment efforts, results in minority participation below the benchmark, race-based mechanisms will remain available. Their scope, however, will vary and be recalculated depending on the extent of the disparity between capacity and participation. Where participation exceeds the benchmark, and can be expected to continue to do so with reduced race-conscious efforts, adjustments will be made.

At the close of each fiscal year, the Department of Commerce will review data collected by its GSA's Federal Procurement Data Center for the three preceding fiscal years to determine the percentage of contracting dollars that has been awarded to minority-owned SDBs in each two-digit SIC code. Commerce will analyze minority SDB participation for all transactions that exceed $25,000. This review will include minority-owned SDBs participating through direct contracting (including full and open competition), the 8(a) program, and SDB prime and subcontracting programs.[18] Data regarding minority participation will be reviewed annually, but will include the past three fiscal years of experience. Examining experience over three year

[18] In order to measure accurately SDB subcontracting participation, it will be necessary to have information regarding SDB subcontracting participation by two-digit SIC code. At the same time, however, it is important to minimize the amount of new record-keeping and reporting that these reforms may require. Prime contractors such as commercial vendors that report SDB participation through company-wide annual subcontracting plans will continue to be able to use this reporting method, with some modification that serves to facilitate SIC code reporting. Under one approach, prime contractors could require all subcontractors to identify their primary SIC code and then track, as most primes do now, the amount of dollars that flows to each subcontractor.

stretches should produce a more accurate picture of minority participation, given short-term fluctuations and the fact that the process of bidding and awarding a contract may span more than a single fiscal year.

Commerce will analyze the data and, after consultation with SBA, report to OFPP regarding which mechanisms should be available in each industry and the size of the credits that can be applied. OFPP will publish and disseminate the mechanisms that can be used by the agencies in the upcoming year.

Pursuant to 15 U.S.C. 644(g), each agency now negotiates goals for SDB participation with SBA for each year. Commerce would inform SBA and agencies of the appropriate benchmark limits for the industries in which the agency contracts and of the mechanisms available.

Where Commerce determines that participation by SDBs in government contracting in an industry is below the relevant benchmark limitation, it may report to OFPP that agencies should be authorized to grant credit to SDB bidders and to prime contractors for SDB subcontracting. Commerce will set a percentage cap of up to ten percent on the amount the credit can allow the price of a contract to deviate from the fair market price. That percentage will represent the maximum credit that each agency may use in the evaluation of bids from SDBs and prime contractors who commit to subcontracting with SDBs. The size of the credit will depend, in part, on the extent of the disparity between the benchmark limitations and minority SDB participation in federal procurement and industry. It also will depend on an assessment of pricing practices within particular industries to indicate the effect of credits within that industry. Commerce's determinations would be published and disseminated by OFPP.

Where the bidding and evaluation credits have been used in an industry and the percentage of dollars awarded to SDBs in that industry exceeds the benchmark limit, Commerce, in consultation with SBA, must estimate the effect of curtailing the use of race-conscious contracting mechanisms and report to OFPP. If Commerce determines that the minority participation rate would fall substantially below the benchmark limit in the absence of race-conscious measures,[19] it need not require agencies to stop using such measures, but may, as described below, require agencies to adjust their use.

Agencies will report the number of contracts that were awarded using a bidding or evaluation credit as well as the amount of those credits. These figures will allow an estimate of the effect on SDB participation of adjusting or removing the credit. In the absence of that objective measure, Commerce will have to estimate and report to OFPP how much minority contracting resulted from the application of these race-conscious measures. One indication may be the success of minorities in winning contracts through direct competition in which race is not used in the decision to award a contract. It may also be useful to examine comparable experience in private industries operating without affirmative action programs.

Even when agencies are not required to terminate bidding and evaluation credits, they may be required to adjust their size in order to ensure that the credits do not lead to the award of a disproportionately large number[ ] of contracts to

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[19] More than three "standard deviations" will generally be viewed as "substantial" for these purposes. Under applicable Supreme Court decisions, a disparity in the range of two or three standard deviations is strong evidence of a prima facie case of discrimination in the employment context. A standard deviation is a measure of the departure from the level of activity that one would expect in the absence of discrimination.

SDBs. Statutory authority for this adjustment exists in both FASA and section 2323. Because the size of credits will affect industries differently, it is impossible to prescribe a set of specific rules to govern adjustments. Responsibility will rest with Commerce to analyze the impact of credits by industry category and make adjustments where appropriate, which would then be published and disseminated by OFPP.

In addition, in some circumstances, an agency may use *less* than the authorized bidding or evaluation credit where necessary to ensure that use of the credits by a specific agency does not unfairly limit the opportunities of non-SDB contractors seeking contracts from that agency. While the size of the maximum credits will be determined on an industry-wide basis and apply across all agencies, it remains important to maintain flexibility at the agency level to ensure against any undue concentrations of SDB contracting and unnecessary use of race-conscious credits. Thus, for example, where an agency has been particularly successful in reaching out to SDB contractors, it may find its use of the full credits unnecessary to achieve its goals, in which event it could, subject to approval by Commerce, depart downward from the authorized credits. The exercise of this discretion will be particularly important to avoid geographic concentrations of SDB contracting that unduly limit opportunities for non-SDBs.

When Commerce concludes that the use of race-conscious measures is not justified in a particular industry (or region), the use of the bidding credit and the evaluation credit will cease. Suspending the use of race-conscious means will not affect the continued use of race-neutral contracting measures. The limits imposed by the benchmarks also would not affect the applicability of statutorily mandated goals, but would limit the extent to which race-conscious means could be used to achieve those goals. For example, DoD would

retain its five percent overall statutory goal and would continue to exhort prime contractors to achieve goals for subcontracting with SDBs. Prime contractors, however, would no longer receive credit in evaluation of their bids for signing up or identifying SDB subcontractors. Likewise, outreach and technical assistance efforts would continue and minority bidders on prime contracts would continue to seek and win competitive awards; but there would no longer be any bidding credit for minority firms.

It should be emphasized that the benchmarks are not a limit on the level of minority contracting in any industry that may be achieved without the use of race-conscious measures. Conversely, there is, of course, no assurance that minority participation in particular industries will reach the benchmark limitations through the available race conscious measures. Minority participation will depend on the availability of qualified minority firms that successfully win contracts through open competition, subcontracting, the 8(a) program or through the application of price or evaluation credits. The system described herein is a good faith effort to remedy the effect of discrimination, but it is not a guarantee of any particular result.

The affirmative action structure described herein does not utilize the statutory authorization under FASA to allow federal agencies (or in the case of DoD its direct authorization under 10 U.S.C. 2323) to set contracts aside for bidding exclusively by SDBs. If federal agencies use race-conscious measures in the manner outlined above, together with concerted race-neutral efforts at outreach and technical assistance as described below, we believe the use of this additional statutory authority should be unnecessary. Following the initial two-year period of the reformed system's operation (and at regular intervals thereafter), however, Commerce, SBA and DoD will evaluate the operation of the

system and determine whether this statutory power to authorize set-asides should be invoked. In making that determination, those agencies will take into account whether persistent and substantial underutilization of minority firms in particular industries or in government contracting as a whole is the result of the effects of past or present discriminatory barriers that are not being overcome by this system.

Such periodic reviews should also consider whether, based on experience, further limitation of the use of race-conscious measures is appropriate beyond those outlined herein. In that regard, it should be noted that the reformed structure is inherently and progressively self-limiting in the use of race-conscious measures. As barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds, operation of the reformed structure will automatically reduce, and eventually should eliminate, the use of race in decisionmaking. In addition, the statutory authority upon which the use of bidding and evaluation credits is based expires at the end of fiscal year 2000. Congress will determine whether that authority should be extended. See 10 U.S.C. 2323; FASA, § 7102.

Section 8(a) Program

Contracts obtained by minority firms through the 8(a) program will count toward the calculation whether minority participation has reached or exceeded the benchmark in any industry.[20] The Administrator of SBA will be under an obligation to monitor the use of the 8(a) program in relation to the benchmark limits. Thus, where Commerce advises that the use of race-conscious measures must be curtailed in a specific industry on the basis of the benchmarks, the Administrator would take appropriate action to limit the use of the program through one or more of the following techniques: (1) Limiting entry into the program in that industry; (2) accelerating graduation for firms that do not need the full period of sheltered competition to satisfy the goals of the program; and (3) limiting the number of 8(a) contracts awarded in particular industries or geographic areas.

[20] As with calculation of the benchmark limitations, see n. 13, *supra*, corporations owned by federally-recognized Native American tribes and Alaskan Native villages will not be included in this calculation.

These same techniques should be used by the Administrator in carrying out existing authority to ensure that 8(a) contracting is not concentrated unduly in certain regions. Even where a market is defined as national in scope, and 8(a) is being used within applicable national benchmark limits, efforts should be made to guard against excessive use of 8(a) contracting in a limited region.

As noted earlier, the 8(a) program is distinct from the general SDB program in that it is animated by its own distinct purpose—to assist socially and economically disadvantaged individuals to overcome barriers that have suppressed business formation and development. Consistent with its unique nature, the 8(a) program has features that already reflect some of the factors that make up the narrow tailoring requirement. Unlike other SDB's, individuals seeking admission to the 8(a) program must establish economic disadvantage without the benefit of any presumption. The Small Business Act defines economically disadvantaged individuals as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." Furthermore, SBA employs objective criteria to measure whether an individual is economically disadvantaged. In this sense, the statute and regulations are targeted toward victims of discrimination; the SBA is proposing to clarify the regulations implementing the

program to emphasize this fact. In addition, individuals are admitted to the 8(a) program for a limited period—nine years—and their performance is reviewed throughout. An individual may be required to leave the program prior to the nine year graduation period if the review reveals that the individual is no longer economically disadvantaged or the firm meets other graduation criteria determined by the SBA.

SBA has under consideration additional program changes designed to ensure that the 8(a) program focuses on its central mission of assisting businesses to develop and concentrates it[s] resources on its intended beneficiaries. These changes would further ensure that the 8(a) program is narrowly tailored to serve the compelling interest for which it was enacted by Congress.

V. Outreach and Technical Assistance

At present, agencies undertake a variety of activities designed to make minority firms aware of contracting opportunities and to help them take advantage of those opportunities. As a general proposition, these activities are not subject to strict scrutiny. The structure outlined above for the use of race-conscious measures assumes that agencies will continue such outreach and technical assistance efforts at all times, so that race-conscious measures will be used only to the minimum extent necessary to achieve legitimate objectives. Our review indicates that, while there are a variety of good programs of this nature operated by various federal agencies, there is a lack of consistency and sustained energy and direction to these efforts.

SBA operates several assistance programs that are targeted toward minority firms, but are also available to qualifying nonminority firms. Notably, pursuant to section 7(j) of the Small Business Act, SBA provides financial

assistance to public and private organizations to provide technical and management assistance to qualifying individuals. 13 CFR 124.403, 404. SBA also operates a program to provide assistance to socially and economically disadvantaged businesses in preparing loan applications and obtaining pre-qualification from SBA for loans. See 13 CFR 120. SBA also operates a surety bond program pursuant to which it provides up to a 90% guarantee for bonds required of small contractors.

The Department of Commerce, through the Minority Business Development Administration, sponsors several programs to provide information, training and research that are targeted toward minority-owned businesses. These programs include Minority Business Development Centers around the country to provide hands on assistance to minority businesses.

DoD has operated since 1990 the Mentor-Protege Pilot Program, which provides incentive for DoD prime contractors to furnish SDBs with technical assistance. See 10 U.S.C. 2301. Mentor firms provide a variety of assistance, including progress payments, advance subcontract payments, loans, providing technical and management assistance and awards of subcontracts on a noncompetitive basis to the protege. DoD reimburses the mentor firm for its expenses. The award of subcontracts under this program is subject to strict scrutiny, but other portions of the program are not.

The following are among the efforts that should be actively pursued:

1. A race-neutral version of the mentor-protege program (that does not guarantee the award of subcontracts on a noncompetitive basis) should be encouraged at all agencies.

2. DoD has proposed—and other agencies should follow DoD's lead—eliminating the impact of surety costs from bids. Because SDB's generally incur higher bond costs, this race-neutral change would assist SDB's and address one of the most frequently cited barriers to minority success in contracting. In this regard, agencies should also examine the use of irrevocable letters of credit in lieu of surety bonds.

3. Where agencies use mailing lists, a minimum goal should be set for inclusion of SDB's on agency mailing lists of bidders.

4. The function of the Procurement Automated Source System (PASS), currently maintained by SBA, should be continued. The system provides contracting officers with a continuously updated list of SDB firms, classified by interest and region.

5. A uniform system for publishing agency procurement forecasts on SBA Online should be established. In addition, SBA should develop a systematic means for publishing upcoming subcontracting opportunities.

6. Agencies should target outreach and technical assistance efforts, including mentor-protege initiatives, toward industries in which SDB participation traditionally has been low. Agencies should continue to pursue strategies in which minority-owned firms are encouraged to become part of joint ventures or form strategic alliances with non-minority enterprises.

7. The SBA should enhance its technical assistance initiatives to enhance the ability of SDBs to use the tools of electronic commerce.

8. Pursuant to Executive Order 12876, which directs agencies to seek to enter into contracts with Historically Black Colleges and Universities, agencies should attempt to increase participation by such institutions in research and

development contracts as means of assisting the development of business relationships between the institutions and SDBs.

9. Each agency should review its contracting practices and its solicitations to identify and eliminate any practices that disproportionately affect opportunities for SDBs and do not serve a valid and substantial procurement purpose.

The foregoing is merely a partial list of possible measures. What is required—both as a matter of policy and constitutional necessity—is a systematic and continuing government-wide focus on encouraging minority participation through outreach and technical assistance. It is proposed in contracting, therefore, that agencies should report annually to the President on their outreach and technical assistance practices. These reports should present the actual practices and experiences of federal agencies and include recommendations as to approaches that can and should be adopted more broadly. The maximum use of such race-neutral efforts will reduce to a minimum the use of race-conscious measures under the benchmark limits described above.

Conclusion

The structure outlined above has been crafted with regard for each of the six factors that courts have identified as relevant in determining whether race-based decisionmaking is narrowly tailored to meet an identified compelling interest. While courts have identified these six factors as relevant in determining whether a measure is narrowly tailored, they have not required that race-conscious enactments satisfy each element or satisfy any particular element to any specific degree. The structure proposed herein for SDB procurement, however, measures up favorably with respect to each of the six factors.

The proposal requires that agencies at all times use race-neutral alternatives to the maximum extent possible. An annual review mechanism is established to ensure maximum use of such race-neutral efforts. Only where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked.

The system is flexible in that race will be relied on only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination. Moreover, the extent of any credit awarded will be adjusted annually to ensure that it is closely matched to the need for a race-based remedial effort in a particular industry.

Race will not be relied upon as the sole factor in SDB procurement decisions. The use of credits (instead of set-asides) ensures that all firms have an opportunity to compete and that in order to obtain federal contracts minority firms will have to demonstrate that they are qualified to perform the work.[21]

Application of the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination.

The duration of the program is inherently limited. As minority firms are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease automatically. When the effects of discrimination have been

[21] The SBA's 8(a) program contains a variety of elements that help to target the program on firms in need of special assistance, including a requirement that applicants affirmatively demonstrate economic disadvantage. Furthermore, the program is not limited to minority-owned firms. These features of the program ensure that race is not the sole factor in determining entry into the program.

eliminated, as demonstrated by minority success in obtaining procurement contracts, reliance on race will terminate automatically. The system as a whole will be reexamined by the executive branch at the end of two years and at regular intervals thereafter. In addition, the principal enactments that this proposal implements, FASA and the Department of Defense Authorization Act, expire at the end of the fiscal year 2000. Congress will have to examine the functioning of this system and make a determination whether to extend the authority to continue its operation.

Finally, the proposal avoids any undue burden on non-beneficiaries of the program. As a practical matter, the overwhelming percentage of federal procurement money will continue to flow, as it does now, to nonminority businesses. Furthermore, implementation of the benchmark limitations will ensure that race-based decisionmaking cannot result in concentrations of minority contracting in particular industries or regions and will thereby limit the impact on non-minorities.

The structure of affirmative action in contracting set forth herein will not be simple to implement and will undoubtedly be improved through further refinement. Agencies will have to make judgments and observe limitations in the use of race-conscious measures, and make concentrated race-neutral efforts that are not required under current practice. The Supreme Court, however, has changed the rules governing federal affirmative action. This model responds to principles developed by the Supreme Court and lower courts in applying strict scrutiny to race-based decisionmaking. The challenge for the federal government is to satisfy, within these newly-applicable constitutional limitations, the compelling interest in remedying the effects of discrimination that Congress has identified.

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Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey

Under the Supreme Court's ruling last year in *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097 (1995), strict scrutiny applies to federal affirmative action programs that provide for the use of racial or ethnic criteria as factors in procurement decisions in order to benefit members of minority groups. Such programs satisfy strict scrutiny if they serve a "compelling interest," and are "narrowly tailored" to the achievement of that interest. Strict scrutiny is the most exacting standard of constitutional review. It is the same standard that courts apply when reviewing laws that discriminate against minority groups. The Supreme Court in *Adarand* did not decide whether a compelling interest is served by the procurement program at issue in the case (or by any other federal affirmative action program), and remanded the case to the lower courts, which had not applied strict scrutiny.[1] Nevertheless, a strong majority of the Court—led by Justice O'Connor, who wrote the majority opinion—admonished that even under strict scrutiny, affirmative action by the federal government is constitutional in appro-

[1] *Adarand* involved a constitutional challenge to a Department of Transportation ("DOT") program that compensates prime contractors if they hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals. The legislation on which the DOT program is based, the Small Business Act, establishes a government-wide goal for participation of such concerns at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). The Act further provides that members of designated racial and ethnic minority groups are presumed to be socially and economically disadvantaged. *Id.* § 637(a)(5)(6), § 637(d)(2),(3). In *Adarand*, the Supreme Court stated that the presumption constitutes race-conscious action, thereby triggering application of strict scrutiny. 115 S. Ct. at 2105.

priate circumstances.[2] Without spelling out in precise terms what those circumstances are, the Court stated that the government has a compelling interest in remedying "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." 115 S. Ct. at 2117.

At bottom, after *Adarand*, the compelling interest test centers on the nature and weight of evidence of discrimination that the government needs to marshal in order to justify race-conscious remedial action. It is clear that the mere fact that there has been generalized, historical societal discrimination in the country against minorities is an insufficient predicate for race-conscious remedial measures; the discrimination to be remedied must be identified more concretely. The federal government would have a compelling interest in taking remedial action in its procurement activities, however, if it can show with some degree of specificity just how "the persistence of both the practice and the lingering effects of racial discrimination"—to use Justice O'Connor's phrase in *Adarand*—has diminished contracting opportunities for members of racial and ethnic minority groups.[3]

[2] *Adarand*, 115 S. Ct. at 2117. The Court emphasized that point in order to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* Seven of the nine justices of the Court embraced the principle that it is possible for affirmative action by the federal government to meet strict scrutiny. This group included: (i) Justice O'Connor and two other justices in the majority, Chief Justice Rehnquist and Justice Kennedy; and (ii) the four dissenting justices (Stevens, Souter, Ginsburg, and Breyer). Only Justices Scalia and Thomas, both of whom concurred in the result in the case, advocated a position that approaches a near blanket constitutional ban on affirmative action.

[3] *Adarand* did not alter the principle that the government may take race-conscious remedial action in the absence of a formal judicial or administrative determination that there has been discrimination against

In coordinating the review of federal affirmative action programs that the President directed agencies to undertake in light of *Adarand*, the Justice Department has collected evidence that bears on that inquiry. The evidence is still being evaluated, and further information remains to be collected. As set forth below, that evidence indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets. In short, there is today a compelling interest to take remedial action in federal procurement.[4]

The purpose of this memorandum is to summarize the evidence that has been assembled to date on the compelling interest question. Part I of the memorandum provides an overview of the long legislative record that underpins the acts of Congress that authorize affirmative action measures

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individual members of minorit[y] groups (or minorities as a class). The test is whether the government has a "strong basis in evidence" for the conclusion that such action is warranted. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989). *Adarand* also did not alter the principle that the beneficiaries of race-conscious remedial measures need not be limited to those individuals who themselves demonstrate that they have suffered some identified discrimination. See *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 482 (1986); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.* at 287 (O'Connor, J., concurring).

[4] The term "federal procurement" refers to goods and services that the federal government purchases directly for its own use. This is to be distinguished from programs in which the federal government provides funds to state and local governments for use in their procurement activities. As part of those programs, Congress has authorized recipients of federal funds to take remedial action in procurement. Those programs are not the focus of this memorandum. However, much of the evidence discussed herein that supports the use of remedial measures in the federal government's own procurement also supports the use of congressionally-authorized remedial measures in state and local procurement.

in procurement—a record that is entitled to substantial deference from the courts, given Congress' express constitutional power to identify and redress, on a nationwide basis, racial discrimination and its effects. The remaining sections of the memorandum survey information from various sources: (1) Congressional hearings and reports that bear on the problems that discrimination poses for minority opportunity in our society, but that are not strictly related to specific legislation authorizing affirmative action in government procurement; (2) recent studies from around the country that document the effects of racial discrimination on the procurement opportunities of minority-owned businesses at the state and local level; and (3) works by social scientists, economists, and other academic researchers on the manner in which the various forms of discrimination act together to restrict business opportunities for members of racial and ethnic minority groups.[5]

All told, the evidence that the Justice Department has collected to date is powerful and persuasive. It shows that the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct.[6]

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[5] It is well-established that the factual predicate for a particular affirmative action measure is not confined to the four corners of the legislative record of the measure. See, *e.g.*, *Concrete Works* v. *City and County of Denver*, 36 F.3d 1513, 1520-22 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995); *Contractors Ass'n* v. *City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993); *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 920 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

[6] Congress has also adopted affirmative action measures in federal procurement, as well as in programs that fund the procurement activities of state and local governments, that are intended to assist women-owned

It is important to emphasize that, even though the government has a compelling interest in taking race-conscious remedial measures in its procurement, their use must be limited. Under the requirements of the "narrow tailoring" prong of strict scrutiny, the federal government may only employ such measures to the extent necessary to serve the compelling interest in remedying the impact of discrimination on minority contracting opportunity. The Justice Department's proposed reforms to affirmative action in federal procurement (to which this memorandum is attached) are intended to target race-conscious remedial measures to markets in which the evidence indicates that discrimination continues to impede the participation of minority firms in contracting. Thus, the proposal seeks to ensure that affirmative action in federal procurement operates in a flexible, fair, limited, and careful manner, and hence will satisfy the requirements of narrow tailoring.

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businesses. At present, such measures are subject to intermediate scrutiny, not the *Adarand* strict scrutiny standard. Therefore, they have not been the focus of the post-*Adarand* review that the Justice Department is coordinating. However, some of the evidence collected by the Justice Department bears on the constitutional justification for affirmative action programs for women in government procurement. See, *e.g.*, Interagency Committee on Women's Business Enterprise, *Expanding Business Opportunities for Women* (1996); National Foundation for Women Business Owners and Dunn & Bradstreet Information Services, *Women-Owned Businesses: A Report on the Progress and Achievement of Women-Owned Enterprises—Breaking the Boundaries* (1995); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 2d Sess. (1994).

I. Survey of the Legislative Record

In evaluating the evidentiary predicate for affirmative action in federal procurement, it is highly significant that the measures have been authorized by Congress, which has the unique and express constitutional power to pass laws to ensure the fulfillment of the guarantees of racial equality in the Thirteenth and Fourteenth Amendments.[7] These explicit constitutional commands vest Congress with the authority to remedy discrimination by private actors, as well as state and local governments.[8] Congress may also exercise its constitutionally grounded spending and commerce powers to ensure that discrimination in our nation is not inadvertently perpetuated through government procurement practices.[9] In exercising its remedial authority, Congress need not target only deliberate acts of discrimination. It may also strive to eliminate the effects of discrimination that continue to impair opportunity for minorities, even in the

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[7] See *Croson*, 488 U.S. at 488 (plurality opinion); *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980) (plurality opinion); *id.* at 500 (Powell, J., concurring); see also *Adarand*, 115 S. Ct. at 2114; *Metro Broadcasting, Inc.* v. *F C C*, 497 U.S. 547, 563 (1990); *id.* at 605-06 (O'Connor, J., dissenting); cf. *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1125 (1996) (reaffirming that broad grant of remedial power under Section 5 of the Fourteenth Amendment enables Congress to override state sovereign immunity).

[8] See *Croson*, 488 U.S. at 490 (plurality opinion); *Fullilove*, 448 U.S. at 476-78 (plurality opinion); *id.* at 500 (Powell, J., concurring); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976); see also *Adarand*, 115 S. Ct. at 2126 (Stevens, J., dissenting); *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting).

[9] See *Croson*, 488 U.S at 492 (plurality opinion) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."); see also *Metro Broadcasting*, 497 U.S. at 563-64; *Fullilove*, 448 U.S at 473-76 (plurality opinion).

absence of ongoing, intentional acts of discrimination.[10] Furthermore, in combatting discrimination and its effects, Congress has the latitude to develop national remedies for national problems. Congress need not make findings of discrimination with the same degree of precision as do state or local governments. Nor is it obligated to make findings of discrimination in every industry or region that may be affected by a remedial measure.[11]

Congress has repeatedly examined the problems that racial discrimination poses for minority-owned businesses. A complete discussion of the entire record of Congress in this area is beyond the scope of this memorandum.[12] The

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[10] See *Adarand*, 115 S. Ct. at 2117 (Congress may adopt affirmative action to remedy "both the practice and the lingering effects of discrimination"). Accord *id.* at 2133 (Souter, J., dissenting) (government may act to redress effects of discrimination "that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination").

[11] *Croson*, 488 U.S. at 490, 504; *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring).

[12] Congressional hearings on the subject from 1980 to the present include the following: *The Small Business Administration's 8(a) Minority Business Development Program: Hearing Before the Senate Comm. on Small Business*, 104th Cong., 1st Sess. (1995); *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *SBA's Minority Business Development Program: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993); *Fiscal Economic and Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking,*

Housing and Urban Affairs, 102d Cong., 2d Sess. (1992); *Small Disadvantaged Business Issues: Hearing Before the Investigations Subcomm. of the House Comm. on Armed Services*, 102d Cong., 1st Sess. (1991); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991); *To Amend the Civil Rights Act of 1964: Permitting Minority Set-Asides: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. (1990); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. of Small Business*, 101st Cong., 2d Sess. (1990); *Minority Business Set-Aside Programs: Hearing Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989); *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988); *Twenty Years after the Kerner Commission: The Need for a New Civil Rights Agenda: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Projects: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988); *The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *Minority Business Development Act: Hearing Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority*

theme that emanates from this record is unequivocal: Congress has adopted race-conscious remedial measures in procurement directly in response to its findings that "widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy."[13] Furthermore, Congress has recognized that expanding opportunities for minority-owned businesses in government procurement helps to bring into mainstream public contracting networks firms that otherwise would be excluded as a result of discriminatory barriers. In light of Congress' expansive remedial charter, it is a fundamental

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Business Development Program: Hearings Before the Senate Comm. on Small Business, 100th Cong., 1st Sess. (1987); *Minority Enterprise and General Small Business Problems: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Senate Comm. on Small Business*, 99th Cong., 2d Sess. (1986); *The State of Hispanic Small Business in America: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Minority Business and Its Contribution to the United States Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. (1982); *Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. (1980).

[13] *Affirmative Action Review: Report to the President* 55 (1995).

principle that courts must accord a significant degree of deference to those findings and the attendant judgment of the Congress that remedial measures in government procurement are warranted.[14]

The relevant congressional findings encompass a broad range of problems confronting minority-owned businesses. They include "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses."[15]

For example, in a report that led to the legislation that created what has become known as the "8(a)" program at the Small Business Administration,[16] and that established goals for participation in procurement at each federal agency by firms owned and controlled by socially and economically disadvantaged individuals (SDBs),[17] a congressional committee found that the difficulties facing minority-owned businesses were "not the result of random chance." Rather, the

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[14] See *Croson*, 488 U.S. at 488-90 (plurality opinion); *Fullilove*, 448 U.S. at 472-73 (plurality opinion); *id.* at 508-10 (Powell, J., concurring); see also *Metro Broadcasting*, 497 U.S. at 563; *id.* at 605-07 (O'Connor, J., dissenting). This principle was not disturbed by the Supreme Court's ruling in *Adarand*; thus, it continues to have force, even under strict scrutiny. See *Adarand*, 115 S. Ct. at 2114; *id.* at 2126 (Stevens, J., dissenting); *id.* at 2133 (Souter, J., dissenting).

[15] *Fullilove*, 448 U.S. at 467 (plurality opinion).

[16] That program targets federal procurement opportunities for small firms owned and controlled by individuals who are socially and economically disadvantaged. See 15 U.S.C. 637(a). Members of certain minority groups are presumed to be socially disadvantaged. 13 C.F.R. Pt. 124.

[17] 15 U.S.C. 644(g).

committee stated, "past discriminatory systems have resulted in present economic inequities."[18] In connection with the same legislation, another committee concluded that a pattern of discrimination "continues to deprive racial and ethnic minorities * * * of the opportunity to participate fully in the free enterprise system."[19] Eventually, when it adopted the 8(a) legislation, Congress found that minorities "have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," and that "it is in the national interest to expeditiously ameliorate" the effects of this discrimination through increased opportunities for minorities in government procurement.[20]

When revamping the 8(a) program in the late 1980s, Congress again found that "discrimination and the present effects of past discrimination" continued to hinder minority business development. Congress concluded that the program required bolstering so that it would better "redress the effects of discrimination on entrepreneurial endeavors."[21]

[18] H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975).

[19] S. Rep. No. 1070, 95th Cong., 2d Sess. 14 (1978). See also H.R. Rep. No. 949, 95th Cong., 2d Sess. 8 (1978).

[20] Pub. L. No. 95-507, § 201, 92 Stat. 1757, 1760 (1978). See 124 Cong. Rec. 35,204 (1978) (statement of Sen. Weicker) (commenting on the introduction of the conference report on the 8(a) legislation and observing that the report recognizes the existence of a "pattern of social and economic discrimination that continues to deprive racial and ethnic minorities of the opportunity to participate fully in the free enterprise system"). In the same year it passed the 8(a) legislation, Congress considered an additional bill that sought to target federal assistance to minority-owned firms. In introducing that measure, Senator Dole remarked that "minority businessmen can compete equally when given equal opportunity. One of the most important steps this country can take to insure equal opportunity for its hispanic, black and other minority citizens is to involve them in the mainstream of our free enterprise system." 124 Cong. Rec. 7681 (1978).

In the same vein are congressional findings that underpin legislation that sets agency-specific goals for participation by disadvantaged businesses—including minority-owned firms—in procurement and grant programs administered by those agencies. For instance, in recommending the continued use of such goals as part of programs through which the Depart-

[21] H.R. Rep. No. 460, 100th Cong., 1st Sess. 16, 18 (1987). See 133 Cong. Rec. 37,814 (1987) (statement of Sen. Bumpers) (discussing proposed revisions to 8(a) program and commenting that minorities "continue to face discrimination in access to credit and markets"); *id.* at 33,320 (statement of Rep. Conte) (discussing proposed revisions to 8(a) program and commenting that effects of discrimination continued to be felt, and that 8(a) amendments were needed to "create a workable mechanism to finally redress past discriminatory practices"). See generally S. Rep. No. 394, 100th Cong., 2d Sess. (1988); *The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *Minority Business Development Act: Hearing Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Small Business Comm.*, 100th Cong., 1st Sess. (1987); *Minority Enterprise and General Small Business Problems: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Senate Comm. on Small Business*, 99th Cong., 2d Sess. (1986); *The State of Hispanic Small Business in America: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985).

ment of Transportation provides funds to state and local governments for use in highway and transit projects, a congressional committee observed that it had considered extensive testimony and evidence, and determined that this action was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway industry and mass transit construction industry."[22]

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[22] S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). The DoT goals were initially established in the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097 (1982). They were continued in the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145 (1987). Congress held further hearings on the subject after passage of STURAA. See *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988). Congress subsequently reauthorized the goals in the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919 (1991). See 137 Cong. Rec. S7571 (June 12, 1991) (statement of Sen. Simpson) (expressing support for continuation of disadvantaged business program at Transportation Department).

Congress has established comparable initiatives to encourage disadvantaged business participation in grant programs administered by the Environmental Protection Agency (EPA). For example, recipients of grants awarded by EPA under the Clean Air Act are required to set disadvantaged business goals. See 42 U.S.C. § 7601 note; see also 42 U.S.C. § 4370d (establishing an SDB goal for recipients of EPA funds used in support of certain environmental-related projects); H.R. Rep. No. 226, 102 Cong., 1st Sess. 48 (1991).

Congress has also established goals for SDB participation in procurement at the Defense Department, and authorized that agency to use specific forms of remedial measures to achieve the goals.[23] The Defense Department program too is predicated on findings that opportunities for minority-owned businesses had been impaired.[24] More fundamentally, in establishing the program, Congress recognized that fostering contracting opportunities for minority-owned businesses at the Defense Department is crucial, because that agency alone typically accounts for more than two-thirds of the federal government's procurement activities. Therefore, affirmative action efforts at the Defense Department enable minority-owned businesses to demonstrate their capabilities to contracting officers at that important procuring agency and to the vast number of nonminority firms that provide goods and services to the Pentagon. In turn, minority-owned businesses can begin to break into the contracting networks from which they typically have been excluded.[25]

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[23] 10 U.S.C. § 2323.

[24] See H.R. Rep. No. 332, 99th Cong., 1st Sess. 139-40 (1985) (if disadvantaged firms had been able to "participate in the 'early' development of major Defense systems, they would have had an opportunity to gain the expertise required to bid on such contracts"); see also H.R. Rep. No. 450, 99th Cong., 1st Sess. 179 (1985); 131 Cong. Rec. 17,445-17,448 (1985); H.R. Rep. No. 1086, 98th Cong., 2d Sess. 100-01 (1984).

[25] See 131 Cong. Rec. 17,447 (1985) (statement of Rep. Conyers) (affirmative action needed to break down "buddy-buddy contracting" at the Defense Department, "which has the largest procurement program in the Federal Government"); *id.* (statement of Rep. Schroeder) (an "old boy's club" in Defense Department contracting excludes many minorities from business opportunities); see also *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 49 (1993) (statement of Rep. Roybal-Allard) ("Old attitudes and old habits die hard * * *. Defense contracting has, traditionally, been a closed shop. Only a

Opportunities for minority-owned businesses to participate in Defense Department procurement increased following the introduction of the affirmative action program there in the late 1980s. However, the effects of discrimination were still felt in federal procurement generally. Based on information it obtained through a 1993 hearing, a congressional committee reported the following year that this "lack of opportunity results primarily from discriminatory or economic conditions," and that "improving access to government contracts and procurement offers a significant opportunity for business development in many industry sectors."[26] In the Federal Acquisition Streamlining Act of 1994, Congress saw fit to make available to all agencies the remedial tools that previously had been granted to the Defense Department, in order to "improv[e] access to contracting opportunities for * * * minority-owned small businesses."[27]

Through its recurring assessments of the implications of discrimination against minority-businesses, Congress has concluded that, standing alone, legislation that simply proscribes racial discrimination is an inadequate remedy. Congress also has attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses.[28] Congress has determined, however, that those

select few need apply. Since the passage of the minority contracting opportunity law, some progress has been made."); H.R. Rep. No. 1086, 98th Cong., 2d Sess. 100-101 (1984) (low level of participation by disadvantaged firms in Defense Department contracting indicated a need to expand procurement opportunities at that agency for such firms).

[26] H.R. Rep. No. 870, 103d Cong., 2nd Sess. 5 (1994).

[27] 140 Cong. Rec. H9242 (Sept. 20, 1994) (statement of Rep. Dellums).

[28] Beginning with the Small Business Act of 1953, Congress has authorized numerous programs to "aid, counsel, assist, and protect * * * the interests of small-business concerns" and "insure that a fair proportion of the total purchases and contracts for supplies and services for the government be placed with small-business enterprises." Pub. L. No. 163,

remedies, by themselves, are "ineffectual in eradicating the effects of past discrimination,"[29] and that race-conscious measures are a necessary supplement to race-neutral ones.[30] Finally, based on its understanding of what happens at the state and local level when use of affirmative action is severely curtailed or suspended outright, Congress has concluded that minority participation in government procurement tends to fall dramatically in the absence of at least some kind of remedial measures, the result of which is to

§ 202, 67 Stat. 232 (1953). After recognizing in the 1960s the specific problems facing minority owned businesses, Congress attempted to address them through race-neutral measures. For example, in 1971, Congress amended the Small Business Investment Act to create a surety bond guarantee program to assist small businesses that have trouble obtaining traditional bonding. In 1972, Congress created a new class of small business investment companies to provide debt and equity capital to small businesses owned by socially and economically disadvantaged individuals. And over the years, Congress has continuously reviewed and strengthened programs to assist all small businesses through the Small Business Act. See *e.g.* Pub. L. No. 93-386, 88 Stat. 742 (1974); Pub. L. No. 94-305, 90 Stat. 663 (1976); Pub. L. No. 95-89, 91 Stat. 553 (1977).

[29] *Croson*, 488 U.S. at 550 (Marshall, J., dissenting). Accord *Fullilove*, 448 U.S. at 467 (plurality opinion); *id.* at 511 (Powell, J., concurring); see also *City of Richmond* v. *J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 48 (1990) (statement of Ray Marshall); H.R. Rep. No. 468, 94th Cong., 1st Sess. 32 (1975).

[30] It bears emphasizing that race-neutral programs for small businesses are important and necessary components of an overall congressional strategy to enhance opportunity for small businesses owned by minorities. For example, Congress has authorized contracting set asides for small businesses generally—minority and nonminority alike—as well as a host of bonding, lending, and technical assistance programs that are open to all small businesses. See 15 U.S.C. § 631 *et seq.*

perpetuate the discriminatory barriers that have kept minorities out of the mainstream of public contracting.[31]

The foregoing is just a sampling from the legislative record of congressionally-authorized affirmative action in government procurement. The remainder of the memorandum surveys evidence from other sources regarding the impact of discrimination on the ability of minority-owned businesses to compete equally in contracting markets. This evidence confirms Congress' determination that race-conscious remedial action is needed to correct that problem.

II. Discriminatory Barriers to Minority Contracting Opportunities

Developing a business that can successfully compete for government contracts depends on many factors. To begin with, technical or professional experience, which is typically attained through employment and trade union opportunities, is an important prerequisite to establishing any business. Second, obtaining financing is necessary to the formation of most businesses. The inability to secure the twin building blocks of experience and financing may prevent a business from ever getting off the ground. Some individuals overcome these initial obstacles and are able to form businesses. However, they subsequently may be shut out from important contracting and supplier networks, which can hinder their ability to compete effectively for contract oppor-

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[31] *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 57, 62-90 (1990); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 39-44 (1990) (statement of Andrew Brimmer).

tunities. And further barriers may be encountered when a business tries to secure bonding and purchase supplies for projects—critical requirements for many major government contracts.

While almost all new or small businesses find it difficult to overcome these barriers and become successful, these problems are substantially greater for minority-owned businesses. Empirical studies and reports issued by congressional committees, executive branch commissions, academic researchers, and state and local governments document the widespread and systematic impact of discrimination on the ability of minorities to carry out each of the steps that are required for participation in government contracting. This evidence of discrimination can be grouped into two categories:

(i) evidence showing that discrimination works to preclude minorities from obtaining the experience and capital needed to form and develop a business, which encompasses discrimination by trade unions and employers and discrimination by lenders;

(ii) evidence showing that discriminatory barriers deprive existing minority firms of full and fair contracting opportunities, which encompasses discrimination by private sector customers and prime contractors, discrimination by business networks, and discrimination by suppliers and bonding providers.

The following provides an overview of both categories of evidence.

A. Effects of Discrimination on the Formation and Development of Minority Businesses

A primary objective of affirmative action in procurement is to encourage and support the formation and development

of minority-owned firms as a remedy to the "racism and other barriers to the free enterprise system that have placed a heavier burden on the development and maturity of minority businesses."[32] That these efforts are necessary is evident from the recent findings by the U.S. Commission on Minority Business Development, appointed by President Bush. The Commission amassed a large amount of evidence demonstrating the marginal position that minority-owned businesses hold in our society:

- Minorities make up more than 20 percent of the population; yet, minority-owned businesses are only 9 percent of all U.S. businesses and receive less than 4 percent of all business receipts.[33]

- Minority firms have, on average, gross receipts that are only 34 [percent] of that of nonminority firms.[34]

- The average payroll for minority firms with employees is less than half that of nonminority firms with employees.[35]

President Bush's Commission undertook an extensive analysis of the barriers that face minority-owned business formation and development. It concluded that "minorities are not underrepresented in business because of choice or

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[32] *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. 4 (1981). See also H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994).

[33] United States Commission on Minority Business Development, *Final Report* 2-6 (1992). These statistics are based on 1987 census data, the most recent full data available regarding the status of minority-owned businesses. Preliminary reports from 1992 census data reveal that the status of minority firms has not significantly improved. For instance, African Americans are 12[%] of the population but, in 1992, owned only 3.6% of all businesses (up from 3.1% in 1987) and received just 1[%] of all U.S. business receipts (which is the same level as in 1987).

[34] *Id.* at 3.

[35] *Id.* at 4.

chance. Discrimination and benign neglect is the reason why our economy has been denied access to this vital resource."[36] Further evidence of the effect of discrimination on minority business development is revealed in recent studies showing that minorities are significantly less likely than whites to form their own business—even after controlling for income level, wealth, education level, work experience, age and marital status.[37] These findings strongly indicate that minorities "face barriers to business entry that non-minorities do not face."[38]

Since the inception of federal affirmative action initiatives in procurement, policy makers have recognized that there are two principal barriers to the formation and development of minority-owned businesses: limited technical experience and limited financial resources. President Nixon's Advisory Council on Minority Business Enterprise identified these barriers in 1973 when it reported that "a characteristic lack of financial and managerial resources has impaired any willingness to undertake enterprise and its inherent risk."[39] Two decades later, a congressional committee found that minorities continue to have "fewer opportunities to develop business skills and attitudes, to obtain necessary resources,

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[36] *Id.* at 60.

[37] See Division of Minority and Women's Business Development, *Opportunity Denied: A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State*, Appendix D, 53-75 (1992) (finding that minorities in New York were 20% less likely to enter self-employment than similarly situated whites); Timothy Bates, *Self-employment Entry Across Industry Groups*, Journal of Business Venturing, Vol. 10, at 143- 56 (1995).

[38] Timothy Bates, *Self-employment Entry Across Industry Groups*, Journal of Business Venturing, Vol. 10, 149 (1995).

[39] Samuel Doctors & Anne Huff, *Minority Enterprise and the President's Council* 4-6 (1973) (quoted in Tuchfarber *et al.*, *City of Cincinnati: Croson Study* 150 (1992)).

and to gain experience, which is necessary for the success of small businesses in a competitive environment."[40] Discrimination in two sectors of the national economy accounts, at least in part, for the diminished opportunity: discrimination by trade unions and employers, which has prevented minorities from garnering crucial technical skills; and discrimination by lenders, which has prevented minorities from garnering needed capital.

1. Discrimination by Trade Unions and Employers

President Nixon's Advisory Council on Minority Business Enterprise determined that "the lack of opportunity to participate in managerial technical training has severely restricted the supply of [minority] entrepreneurs, managers and technicians."[41] A history of discrimination by unions and employers helps to explain this unfortunate phenomenon.

Prior to the civil rights accomplishments of the 1960s, labor unions and employers were virtually free to practice overt racial discrimination. Minorities were segregated into menial, low wage positions, leaving no minority managers or white collar workers in most sectors of our economy. Trade unions, which controlled training and job placement in many skilled trades, commonly barred minorities from membership. As a result, "whole industries and categories of employment were, in effect, all-white, all-male."[42] These practices left minorities unable to gain the experience needed to operate all but the smallest businesses, primarily consisting of small "mom and pop" stores with no employees, minimal

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[40] H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994).

[41] Samuel Doctors & Anne Huff, *Minority Enterprise and the President's Council* 4-6 (1973) (quoted in Tuchfarber *et al., City of Cincinnati: Croson Study* 150 (1992)).

[42] *Affirmative Action Review: Report to the President* 7 (1995).

revenue, located in segregated neighborhoods, and serving an exclusively minority clientele.[43]

Discrimination by unions has been recognized as a major factor in preventing minorities from obtaining employment opportunities in the skilled trades. Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination) was passed, in part, in response to Congress's desire to halt "the persistent problems of racial and religious discrimination or segregation * * * by labor unions and professional, business, and trade associations."[44] Even after Title VII went on the books, however, unions precluded minorities from membership through a host of discriminatory policies, including the use of "tests and admissions criteria which [have] no relation to on-the-job skills and which [have] a differential impact" on minorities;[45] discriminating in the application of admission criteria;[46] and imposing admission

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[43] See, *e.g.*, Joseph Pierce, *Negro Business and Business Education* (1947); Andrew Brimmer, *The Economic Potential of Black Capitalism*, Public Policy Vol. 19, No. 2, at 289-308 (1971); Kent Gilbreath, *Red Capitalism: An Analysis of the Navajo Economy* (1973).

[44] S. Rep. No. 872, 88th Cong., 1st Sess. 1 (1964). See, *e.g.*, Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. VII, 11-17 (1990) (in 1963, minorities were prohibited from joining Atlanta unions representing plumbers, electricians, steel workers and bricklayers); TEM Associates, *Minority/Women Business Study: Revised Final Report, Phase I*, Volume I 3-13 ("In 1963, not one of the 1,000 persons in apprenticeship training in Dade County was Black, and the Miami Sheet Metal Workers local, like most other trade unions, was all white.").

[45] *United States v. Iron Workers Local 86*, 443 F.2d 544, 548 (9th Cir.), cert. denied, 404 U.S. 984 (1971). See also *Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980) (selection criteria, including aptitude test, and the requirement of a high school diploma as a condition of eligibility were discriminatory).

[46] *United States v. Iron Workers Local 86*, 443 F.2d 544, 548 (9th Cir.) (differential application and admissions requirements between whites and

conditions, such as requiring that new members have a family relationship with an existing member, that locked minorities out of membership opportunities.[47] As a result, unions remained virtually all-white for some time after the enactment of Title VII:

- In 1965, the President's Commission on Equal Opportunity found that out of 3,969 persons selected for skilled trade union apprenticeships in 30 southern cities, only 26 were black.[48]

- In 1967, blacks made up less than 1 percent of the nation's mechanical union members (i.e. sheet metal workers, boilermakers, plumbers, electricians, ironworkers and elevator constructors).[49]

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blacks; spurious reasons given for rejections of blacks), cert. denied, 404 U.S. 984 (1971); *Sims v. Sheet Metal Workers Int'l Ass'n*, 489 F.2d 1023 (6th Cir. 1973) (union waived requirements for white applicants).

[47] *United States v. United Bhd. of Carpenters and Joiners of America*, 457 F.2d 210, 215 (7th Cir.), cert. denied, 409 U.S. 851 (1972) (family relation requirement excluded minorities from Carpenters trade); *United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 438 F.2d 679, 683 (7th Cir.) (requiring family relationships between new and existing members "effectively precluded non-white membership"), cert. denied, 404 U.S. 830 (1971); *Asbestos Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (rule restricting membership to sons or close relatives of current members perpetuated the effect of past exclusion of minorities).

[48] Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 24 (1989) (citing findings of President's Commission on Equal Opportunity).

[49] Steve Askin & Edmund Newton, *Blood, Sweat and Steel*, Black Enterprise, Vol. 14, at 42 (1984).

- In 1969, only 1.6 percent of Philadelphia construction union members were minorities.[50]

Even when minorities were admitted to unions, discriminatory hiring practices and seniority systems often were used to foreclose job opportunities to them.[51] These actions were the subject of numerous civil rights suits, leading the Supreme Court to declare in 1979 that "judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."[52] Well into the 1980s, courts, committees of Congress, and administrative agencies continued to identify the "inability of many minority workers to obtain jobs" through unions because of "slavish adherence to traditional preference practices [and] also [ ] overt discrimination."[53]

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[50] Department of Labor Memorandum from Arthur Fletcher to All Agency Heads (1969) (cited in *Affirmative Action Review: Report to the President* 11 (1995)) (introducing the "Philadelphia Plan" requiring the use of affirmative action goals and timetables in construction, Secretary Fletcher noted that "equal employment opportunity in these trades in the Philadelphia area is still far from a reality. * * * We find, therefore, that special measures are required to provide equal opportunity in these seven trades").

[51] See *Pennsylvania* v. *Operating Eng'rs, Local 542*, 469 F. Supp. 329, 339 (E.D. Pa. 1978) (unions held liable for racial discrimination in employee referral procedures and practices); Waldinger & Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, Politics and Society, Vol. 19, No. 3, at 299 (1991) ("Despite rules and formal procedures, informal relationships still dominate the union sector's employment processes."); Edmund Newton, *Steel, The Union Fiefdom*, Black Enterprise, Vol. 14, at 46 (1984) (discrimination in operation of hiring halls "operated as impenetrable barriers" to minority job seekers). See generally Barbara Lindeman Schlei & Paul Grossman, *Employment Discrimination Law* 619-28 (1983).

[52] *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n. 1 (1979).

[53] *Taylor v. United States Dept. of Labor*, 552 F. Supp. 728, 734 (E.D. Pa. 1982). See *Minority Business Participation in Department of Trans-*

The discriminatory conduct that was the subject of the Supreme Court's decision in *Local 28, Sheet Metal Workers v. EEOC*,[54] is illustrative of the pattern of racial exclusion by trade unions and its consequences for minorities. The union local operated an apprenticeship training program designed to teach sheet metal skills. Apprentices enrolled in the program received class-room training, as well as on-the-job work experience. As the Supreme Court described it, successful completion of the program was the principal means of attaining union membership. But by excluding minorities from the apprenticeship program through "pervasive and egregious discrimination,"[55] the local effectively excluded minorities from the union for decades. Such exclusion continued notwithstanding the passage of Title VII and a series of administrative and judicial findings in the 60s and 70s that the local had engaged in blatant discrimination in shutting minorities out of the program. Indeed, even into the 80s, the local persisted in violating court orders to open up the program to minorities.[56]

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portation Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 201 (1985) (testimony of James Haughton) (minority contractors continue to "suffer[] heavily because they have been victims to that discrimination as practiced by the unions"); Division of Minority and Women's Business Development, *Opportunity Denied!: A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State* 41 (1992) ("At least seven reports were issued by federal, state and city commissions and agencies between 1963 and 1982 documenting the pattern of racial exclusion from New York's skilled trade unions by constitution and by-law provisions, member sponsorships rules, subjective interview tests and other techniques, as well as the complicity of construction contractors and the acquiescence of government agencies in those practices.").

[54] 478 U.S. 421 (1986)

[55] *Id.* at 476.

[56] *Id.* at 433-34.

More recently, a Yale University economist prepared a report documenting the history of discrimination by New Haven unions that "confirms the nationwide pattern of discrimination."[57] Prior to the passage of the Civil Rights Act of 1964, New Haven's unions prohibited minority membership, and minority workers were almost completely segregated into jobs that whites would not take because they required working under conditions of extreme heat or discomfort.[58] After passage of the Civil Rights Act, minorities were prevented from entering unions by a rule requiring that at least three current members sponsor the application of any new member.[59] Although the policy was race-neutral on its face, "it was almost impossible to find three members who would nominate a minority [and] stand up for him in a closed meeting when other members would undoubtedly attack the candidate and his sponsors."[60] This and other discriminatory policies prevented all but five African Americans from joining the 1,216 white members of the highest paid skilled trade unions in 1967, and throughout the mid-70s, unions and apprenticeship programs remained virtually all-white.[61] The report concluded that the history of "blocked access to the skilled trades is the most important explanation of the low numbers of minority and women construction contractors today."[62]

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[57] Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 25-26 (1989).

[58] *Id.* at 26-27.

[59] *Id.* at 28.

[60] *Id.* at 28.

[61] *Id.* at 33; New Haven Board of Aldermen, Minority and Women Business Participation in the New Haven Construction Industry: Committee Report 7 (1990).

[62] Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34

There is no doubt that trade unions have put much of the discriminatory past behind them, and they now provide an important source of opportunity for minorities. Some barriers to full opportunity remain, however.[63]

A parallel history of discriminatory treatment by employers has prevented minorities from rising into the private sector management positions that are most likely to lead to self-employment. In 1972, Congress found that only 3.5 percent of minorities held managerial positions compared to

(1989). Comparable conclusions about the impact of trade union discrimination have been reached in studies from other jurisdictions around the country. See, *e.g.*, D.J. Miller & Associates, *et al.*, *The Disparity Study for Memphis Shelby County Intergovernmental Consortium* 11-46 (Oct. 1994) ("In Memphis, trade unions have historically discriminated against African Americans."); *Report of the Blue Ribbon Panel to the Honorable Richard M. Daley, Mayor of the City of Chicago* 43 (March 1990) ("The Task Force specifically notes the exclusion of minorities and women from the building trades."); National Economic Research Associates, *et al.*, *Availability and Utilization of Minority and Women-Owned Business Enterprises at the Massachusetts Water Resources Authority* 72 (Nov. 1990) ("A number of M/WBE owners complain that problems caused by unions are exacerbated by state bidding requirements that make it difficult or impossible for non-union firms to bid."); Coopers & Lybrand, *et al.*, *State of Maryland Minority Business Utilization Study* 9 (Feb. 1990) (discussing discriminatory union practices).

[63] See BPA Economics, *et al.*, *MBE/WBE Disparity Study of the City of San Jose* I-34 (1990) ("When trying to join unions, minorities may face testing and experience requirements that are waived in the case of relatives of current union members."); Waldinger & Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, Politics and Society, Vol. 19, No. 3, at 296-97 (1991) ("In 1987, blacks averaged less than 80 percent of parity for all skilled trades with even lower levels of representation in the most highly paid crafts like electricians and plumbers."); *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the Comm. on Government Operations*, 101st Cong., 2d Sess. 111-15 (1990).

11.4 percent of white employees.[64] Congress attributed this underrepresentation to continued discriminatory conduct by "employers, labor organizations, employment agencies and joint labor-management committees."[65] Evidence derived from caselaw and academic studies shows a variety of discriminatory employment practices, including promoting white employees over more qualified minority employees;[66] relying on word-of-mouth recruiting practices that exclude minorities from vacancy announcements;[67] and creating promotion systems that lock minorities into inferior positions.[68]

[64] H.R. Rep. No. 238, 92d Cong., 2d Sess. 3 (1972).

[65] *Id.* at 7.

[66] See, *e.g.*, *Winbush* v. *Iowa*, 69 FEP Cases 1348 (8th Cir. 1995) (evidence was "overwhelming" that employer had engaged in disparate treatment with respect to promotion of black employees); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (99 percent white management structure caused, in part, by promoting lesser qualified white employees over more qualified minorities).

[67] See, *e.g.*, *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 313 (6th Cir. 1975), vacated and remanded on other grounds, 431 U.S. 951 (1977) (finding discrimination in "the practice of relying on referrals by a predominantly white work force"); *Long* v. *Sapp*, 502 F.2d 34, 41 (5th Cir. 1974) (word-of-mouth recruitment serves to perpetuate all-white work force); *Thomas* v. *Washington County Sch. Bd.*, 915 F.2d 922 (4th Cir. 1990). See also Univ. of Mass., *Barriers to the Employment and Work-Place Advancement of Latinos: A Report to the Glass Ceiling Commission* 52 (Aug. 1994) (word-of-mouth recruiting methods that rely on social networks are a significant "exclusionary barrier" to employment opportunities for minorities); Roosevelt Thomas, *et al.*, *The Impact of Recruitment, Selection, Promotion and Compensation Policies and Practices on the Glass Ceiling*, submitted to U.S. Department of Labor Glass Ceiling Commission, 14 (April 1994) (noting that "recruitment practices primarily consist[ing] of word-of-mouth and employee referral networking * * * promote the filling of vacancies almost exclusively from within. If the environment is already homogenous, which many are, it maintains this same 'home-grown' environment"); Gertrude Ezorsky, *Racism and Justice: The Case for Affirmative Action 14- 18 (1991)*; U.S. Commission

A study published earlier this year surveyed a broad range of current labor market evidence and concluded that employment discrimination is "not a thing of the past."[69] Rather, race still matters when it comes to determining access to the best employment opportunities.[70] Progress has been made, of course. Yet, "more than three decades after the passage of the Civil Rights Act, segregation by race and sex continues to be the rule rather than the exception in the American workplace, and discrimination still reduces the pay and prospects of workers who are not white or male."[71] The exclusionary conduct frequently is not deliberate, and the people on top—who are mostly white and male—often believe that they are behaving fairly. But old habits die hard: reliance on outmoded stereotypes and group reputations, and the persistence of "invisible biases" work to perpetuate a system that creates disadvantages in employment for minorities today.[72]

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on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 8 (1981); Barbara Lindeman Schlei & Paul Grossman, *Employment Discrimination Law* 571 (1983).

[68] See, *e.g.*, *Paxton* v. *Union National Bank*, 688 F.2d 552, 565-566 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983); *Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981) (system requiring that porters, all of whom were black, forfeit seniority when changing jobs designed to prevent promotion of black employees), cert. denied, 456 U.S. 964 (1982); *Terrell* v. *U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981) (seniority system created for clearly discriminatory purposes), vacated on other grounds, 456 U.S. 955 (1982). See also Ella Bell & Stella Nkomo, *Barriers to Workplace Advancement Experienced by African Americans* 3 (1994) ("African Americans * * * are functionally segregated into jobs less likely to be on the path to the top levels of management.").

[69] Barbara Bergmann, *In Defense of Affirmative Action* 32-33 (1996).

[70] Id. at 33.

[71] *Id.* at 62.

[72] *Id.* at 63-82.

The results of recent "testing" studies—in which equally matched minorities and nonminorities seek the same job—are but one source of evidence supporting this conclusion. These studies show, for instance, that white males receive 50 percent more job offers than minorities with the same characteristics applying for the same jobs.[73] As Justice Ginsburg described them, the testing studies make it abundantly clear that "[j]ob applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race."[74]

Even when minorities are hired today, a "glass ceiling" tends to keep them in lower-level positions. This problem was recognized by Senator Dole who, in 1991, introduced the Glass Ceiling Act on the basis of evidence "confirming * * * the existence of invisible, artificial barriers blocking women and minorities from advancing up the corporate ladder to management and executive level positions."[75] That Act created the Federal Glass Ceiling Commission, which subsequently completed an extensive study of the opportunities available to minorities and women in private sector employment, and concluded that "at the highest levels of business, there is indeed a barrier only rarely penetrated by women or persons of color."[76] Evidence released by the Commission paints the following picture:

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[73] Cross *et al.*, *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers* (1990); Turner *et al.*, *Opportunities Denied, Opportunities Diminished: Discrimination in Hiring* (1991).

[74] *Adarand*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting).

[75] Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* iii (1995) (citing 1991 statement by Senator Dole regarding 1991 Department of Labor *Report on the Glass Ceiling Initiative*).

[76] *Id.* at iii.

- 97 percent of the senior level managers in the nation's largest companies are white.[77]

- Black and Hispanic men are half as likely as white men to be managers or professionals.[78]

- In the private sector, most minority managers and professionals are tracked into areas of the company—personnel, communications, affirmative action, public relations—that are not likely to lead to advancement to the highest levels of experience.[79]

- Because private sector opportunities are so limited, most minority professionals and managers work in the public sector.[80]

In light of the evidence that it considered, the Commission concluded that, "in the private sector, equally qualified and similarly situated citizens are being denied equal access to advancement on the basis of gender, race, or ethnicity."[81]

In sum, there are two central means to gaining the experience needed to operate a business. One is to be taught by a parent, passing on a family-owned business. But the long history of discrimination and exclusion by unions and employers means there are very few minority parents with any such business to pass on.[82] The second avenue is to learn

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[77] *Id.* at 9.

[78] *Id.* at iv-vi.

[79] *Id.* at 15-16.

[80] *Id.* at 13.

[81] *Id.* at 10-11.

[82] See, *e.g.*, *The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislative and National Security Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 111 (1990) (statement of Manuel Rodriguez) ("[f]ew [minorities] today have families from whom they can inherit" a business); H.R. Rep. No. 870, 103d

the skills needed through private employment. But the effects of employment and trade union discrimination have posed a constant barrier to that entryway into the business world.[83]

2. Discrimination by Lenders

Without financing, a business cannot start or develop. There are two main methods for a new business to raise capital. One is to solicit investments from the public by selling stock in the company (public credit); the other is to solicit investments from banks or other lenders (private credit). Congress has heard evidence that "since small businesses have very limited or no access to public credit markets, it is critically important that these entities, especially minority-owned small businesses, have adequate access to bank credit on reasonable terms and conditions."[84] The rub

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Cong., 2d Sess. 15 n.36 (1994) ("[T]he construction industry is * * * family dominated. Many firms are in their second or third generation operating structures."); New Haven Board of Aldermen, *Minority and Women Business Participation in the New Haven Construction Industry* 10 (1990) ("The exclusion of minorities from construction trades employment before the 1970s resulted in an absence of a parent or family member owning a construction business.").

[83] National Economic Research Associates, *et al.*, *The Utilization of Minority and Women-Owned Businesses Enterprises by Alameda County* 176-77 (June 1992) ("A number of witnesses identified historic union discrimination as a major limitation to the formation and success of minority firms."); Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989) (discrimination has prevented minorities from "gain[ing] experience and skills" necessary to operate a business and therefore has "kept the pool of potential minority * * * contractors artificially small").

[84] *Availability of Credit to Minority and Women-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on*

is that small businesses owned by minorities find it much more difficult than small firms owned by nonminorities to secure capital. Indeed, this is often cited as the single largest factor suppressing the formation and development of minority-owned businesses.[85] The sad fact is that, through countless hearings, Congress has learned that lending discrimination plays a major role in this regard.[86]

Banking, 103d Cong., 2d Sess. 6 (1994) (statement of Andrew Hove). One reason that minorities starting small businesses are especially reliant on bank lending is because they traditionally lack personal wealth or access to other sources of private credit, such as loans from family or friends. See generally Oliver & Shapiro, *Black Wealth/White Wealth* (1993).

[85] See *The Wall Street Journal Reports: Black Entrepreneurship* R.1 (1992) (Roper Organization poll of 472 minority business owners listed access to capital as the primary barrier to their business development); United States Commission on Minority Business Development, *Final Report* 12 (1992) ("One of the most formidable stumbling blocks to the formation and development of minority businesses is the lack of access to capital.").

[86] See *Availability of Credit to Minority and Women Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking*, 103d Cong., 2d Sess. 27 (1994) (statement of Wayne Smith) (while perhaps more subtle than discrimination in mortgage lending, discrimination in business lending exists); H.R. Rep. No. 870, 103d Cong., 2d Sess. 7 (1994) ("There is a widespread reluctance on the part of the commercial banking * * * and capital markets to take the same risks with a [minority] entrepreneur that they would readily do with a white one."); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. 26 (1988) (statement of Joann Payne) ("[b]ecause of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans."); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong. 1st Sess. 363 (1985) (statement of James Laducer) (North

Over and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with *identical* collateral and borrowing credentials:

- The typical white-owned business receives three times as many loan dollars as the typical black-owned business with the same amount of equity capital.[87] In construction, white-owned firms receive *fifty* times as many loan dollars as black-owned firms with identical equity.[88]

- Minorities are approximately 20 percent less likely to receive venture capital financing than white firm owners with the same borrowing credentials.[89]

Dakota banks "refuse to lend monies to minority businesses from nearby Indian communities"); see also *Fiscal Economic and Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 2d Sess. (1992); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. (1990); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101 Cong., 1st Sess. (1989).

[87] Timothy Bates, *Commercial Bank Financing of White and Black Owned Small Business Start-ups*, Quarterly Review of Economics and Business, Vol. 31, No. 1, at 79 (1991) ("The findings indicate that black businesses are receiving smaller bank loans than whites—not because they are riskier, but, rather, because they are black-owned businesses.").

[88] Grown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992).

[89] Bradford & Bates, *Factors Affecting New Firms Success and their Use in Venture Capital Financing*, Journal of Small Business Finance, Vol. 2, No. 1, at 23 (1992) ("The venture capital market * * *

- All other factors being equal, a black business owner is approximately 15 percent less likely to receive a business loan than a white owner.[90]
- The average loan to a black-owned construction firm is $49,000 less than the average loan to an equally matched nonminority construction firm.[91]

A comparable pattern of disparity appears in the most recent study on lending to minority firms, which was released earlier this year. That study surveyed 407 business owners in the Denver area. It found that African Americans were 3 times more likely to be rejected for business loans than whites.[92] The denial rate for Hispanic owners was 1.5 times as high as [for] white owners.[93] Disparities in the denial rate remained significant even after controlling for other factors that may affect the lending rate, such as the size and net worth of the business.[94] The study concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample (Black, Hispanic and Anglo) were not appreciably different as businesspeople,

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differentially restricts minority entrepreneurs from obtaining venture capital.").

[90] Faith Ando, *Capital Issues and the Minority-Owned Business*, The Review of Black Political Economy, Vol. 16, No. 4, at 97 (1988).

[91] Grown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992).

[92] The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver v.* (1996). See Michael Selz, *Race-Linked Gap is Wide in Business-Loan Rejections*, Wall St. J., May 6, 1996, at B2.

[93] The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver v.* (1996).

[94] *Id.*

they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial."[95]

In sum, capital is a key to operating a business. Without financing, no business can form. Once formed, restricted access to capital impedes investments necessary for business development. Minority-owned firms face troubles on both fronts. And in large part, those troubles stem from lending discrimination.[96] As President Bush's Commission on Minority Business Development explained, the result is a self-fulfilling prophecy:

> Our nation's history has created a "cycle of negativity" that reinforces prejudice through its very practice; restraints on capital availability lead to failures, in turn, reinforce a prejudicial perception of minority firms as inherently high-risks, thereby reducing access to even more capital and further increasing the risk of failure.[97]

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[95] *Id.*

[96] There is also evidence that minorities face discrimination in mortgage lending. See Munnell *et al.*, *Mortgage Lending In Boston: Interpreting the HMDA Data*, 86 Am. Econ. Rev. 25 (1996) (finding that minority applicants were 60 percent more likely to be rejected for a mortgage loan than white males with identical characteristics, including age, income, wealth, and education). This serves to aggravate the problems that minorities face in seeking business loans, because an important source of collateral for such loans to a new firm is the home of the owner of the firm. Thus, mortgage discrimination that impedes the ability of minorities to obtain loans to purchase homes (or drives them to purchase less valuable homes than they otherwise would) diminishes their ability to post collateral for business loans.

[97] United States Commission on Minority Business Development, Final Report 6 (1992). While the nation has made great strides in overcoming racial bias, the Commission's apt characterization of the debilitating effects of lending discrimination mirrors the description of the problem in a landmark monograph written over one-half century ago:

B. Discrimination in Access to Contracting Markets

Even when minorities are able to form and develop businesses, discrimination by private sector customers, prime contractors, business networks, suppliers, and bonding companies raises the costs for minority firms, which are then passed on to their customers. This restricts the competitiveness of minority firms, thereby impeding their ability to gain access to public contracting markets.

1. Discrimination by Prime Contractors and Private Sector Customers

In the private sector, minority business owners face discrimination that limits their opportunities to work for prime contractors and private sector customers. All too often, contracting remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work.[98] Because

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> The Negro Businessman encounters greater difficulties than whites in securing credit. This is partially due to the marginal position of negro business. It is also partially due to prejudicial opinions among whites concerning business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

Gunnar Myrdal, *An American Dilemma: The Negro and Modern Democracy* 308 (6th ed. 1944).

[98] See New Haven Board of Aldermen, *Minority and Women-Business Participation in the New Haven Construction Industry* 10 (1990) ("The construction industry in New Haven remains to a large extent a closed network of established contractors and subcontractors who have close long-term relationships and are highly resistant to doing business with 'outsiders.'"); Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. II, 61 (1990) (member of trade association testified that "contractors develop good working relationships with certain subcontractors

minority-owned firms are new entrants to most markets, the existence and proliferation of these relationships locks them out of subcontracting opportunities. As a result, minority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements.[99] In addition, when minority firms are per-

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and tend to use them repeatedly, even in a few cases when their prices are just a little bit higher than other subcontractors").

[99] See National Economic Research Associates, *The State of Texas Disparity Study: A Report to the Texas Legislature as Authorized by H.B. 2626, 73rd Legislature* 148 (1994) ("African American owner * * * told by an employee of a prime contractor that the contractor prefers to work with [nonminority-owned firms] and works with [minority-owned firms] only when required to do so."); D.J. Miller & Associates, *Disparity Study for Memphis/Shelby County Intergovernmental Consortium* VII-10 (1994) ("Majority companies will not do business with [minority-owned businesses] because they lack confidence in [them] and are not willing to go beyond those businesses with whom they have a 10 to 15 year relationship."); Brown, Botz & Coddington, *Disparity Study: City of Phoenix* VIII-10 (July 1993) ("From the responses of a number of MBE/WBEs, another form of marketplace discrimination that severely hampers their access to the marketplace is denial of the opportunity to bid. This may occur in a variety of ways, including, but not limited to, the use of non-competitive procurement and selection procedures, as well as intentional acts of rejection."); National Economic Research Associates, *The Utilization of Minority and Woman-Owned Businesses by Contra Costa County: Final Report* ix, xiii (1992) (70 percent of minority-owned firms reported seldom or never being used for contracts that do not contain affirmative action requirements); National Economic Research Associates, *The Availability and Utilization of Minority-Owned Business Enterprises at the Massachusetts Water Resources Authority* 74 (1992) (55 percent of minority-owned construction firms reported that prime contractors that use their firms on contracts with affirmative action requirements seldom or never used their firms on projects that do not contain such requirements); *A Study to Identify Discriminatory Practices in the Milwaukee Construction Marketplace* 125 (Feb. 1990) ("Only 18% of black contractors currently have private sector contracts with primes with which they have worked on public sector contracts with MBE require-

mitted to bid on subcontracts, prime contractors often resist working with them. This sort of exclusion is often achieved by white firms refusing to accept low minority bids or by sharing low minority bids with another subcontractor in order to allow that business to beat the bid (a practice known as "bid shopping").[100] These exclusionary practices have been the subject of extensive testimony in congressional hearings.[101]

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ments."); see also *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 916 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (noting reports that non-minority firms in the county refused to work with minority firms); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990) (noting reports that when minority contractors in the county "approached prime contractors, some prime contractors either were unavailable or would refuse to speak to [the minority contractors]").

[100] See *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1416 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992) (noting reports that local minority firms were "denied contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990) ("[c]ontrary to their practices with non-minority subcontractors," local prime contractors would take minority subcontractors' bids "around to various non-minority subcontractors until they could find a non-minority to underbid [the minority firm]"); BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-12 (1992) (low bidding Hispanic contractor told that he was not given subcontract because the prime contractor "did not know him" and that the prime "had problems with minority subs in the past"); BPA Economics, *MBE/WBE Disparity Study for the City of San Jose (Vol. 1)* III-1 (1990) (describing practices contributing to low utilization in construction contracts as including "bid shopping, insufficient distribution of notices of contracts [and] insufficient lead time to prepare bids"); BBC Research and Consulting, *The City of Tucson Disparity Study* IX-9-IX-11 (June 1994) (same).

[101] See, *e.g.*, *How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 54 (1989) (statement of Marc Bendick) ("[t]he same prime contractor who will

An Atlanta study revealed evidence of the effect of discrimination by private sector customers and prime contractors on minority contracting opportunities. The study found that 93 percent of the revenue received by minority-owned firms came from the public sector and only 7 percent from the private sector. In sharp contrast, the study found that non-minority firms receive only 20 percent of their revenue from the public sector and 80 percent from the private sector.[102] In addition, the study reported that nearly half of the black-owned firms worked primarily for minority customers, and minority firms rarely worked in a joint venture with a white-owned firm.[103]

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use a minority subcontractor on a city contract and will be terribly satisfied with the firm's performance, will simply not use that minority subcontractor on a private contract where the prime contractor is not forced to use a minority firm."); *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the Comm. on Government Operations*, 101st Cong., 2d Sess. 57 (1990) (statement of Gloria Molina); *id.* at 100-101 (statement of E.R. Mitchell); *id.* at 113 (statement of Manuel Rodriguez); *A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 1st Sess. 593 (1987) (statement of Edward Irons); *Small Disadvantaged Business Issues: Hearings Before the Investigations Subcomm. of the House Comm. on Armed Services*, 100th Cong., 1st Sess. 19-23 (1991) (statement of Parren Mitchell).

[102] Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. I, 9-10 (1990). See also D.J. Miller & Associates, *City of Dayton: Disparity Study* 183 (1991) ("A small percentage of Black firms' revenues come from private sector projects.").

[103] Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. III, 15, 34 (1990).

Customer prejudices are sometimes graphically expressed. African American business owners have reported arriving at job [s]ites to find signs saying "No Niggers Allowed,"[104] and "Nigger get out of here."[105] Other potential customers have simply refused to work with a business after discovering that its owner is a minority. In a recent encounter, a black business owner arriving at a home-site was told to leave by a white customer, who commented "you didn't tell me you were black and you don't sound black."[106]

2. Discrimination by Business Networks

Contrary to the common perception, contracting is not a "meritocracy" where the low bidder always wins. "(B)eneath the complicated regulations and proliferation of collective bargaining contracts lies a different reality, one dominated mainly by personal contacts and informal networks."[107] These networks can yield competitive advantages, because they serve as conduits of information about upcoming job opportunities and facilitate access to the decisionmakers (*e.g.*, contracting officers, prime contractors, lenders, bonding agents and suppliers). Simply put, in contracting, access

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[104] New Haven Board of Aldermen, *Minority and Women Participation in the New Haven Construction Industry* 10 (1990).

[105] National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses by the City of Hayward* 6-23 (1993).

[106] See BBC Research and Consulting, *City of Tuscon Disparity Study* IX-23 (1994).

[107] Bailey & Waldinger, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, Politics and Society, Vol. 19, No. 3, 298 (1991). See Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. II, 35 (1990) ("(M)ost job seekers find their jobs through informal channels. So too it is with construction markets, especially in the private sector.").

to information is a ticket to success; lack of information can be a passport to failure. Networks and contacts can help a business find the best price on supplies, facilitate a quick loan, foster a relationship with a prime contractor, or yield information about an upcoming contract for which the firm can prepare—all of which serve to make the firm more competitive.

What transforms the mere existence of established networks into barriers for minority-owned businesses is the extent to which they operate to the exclusion of minority membership. It has been recognized in Congress that private sector business networks frequently are off-limits to minorities: "institutional wall(s)," and "old-boy network(s) * * * make( ) it exceedingly difficult for minority firms to break into the private commercial sector."[108] Parallel descriptions appear in numerous state and local studies.[109]

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[108] *Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. 127 (1988) (statement of Parren Mitchell). See H.R. Rep. No. 870, 103d Cong., 2d Sess. 15 n.36 ("The construction industry is close-knit; it is family dominated (and reflects an) old buddy network. Minorities and women, unless they are part of construction families, have been and will continue to be excluded whenever possible."); *Minorities and Franchising: Hearings Before the House Comm. on Small Business*, 102d Cong., 1st Sess. 54 (1991) (statement of Rep. LaFalce) (discussing "problems relating to exclusion of minorities or groups of minorities from franchise systems"); 131 Cong. Rec. 17,447 (1985) (statement of Rep. Schroeder) (an "old boy's club" excludes many minorities from business opportunities).

[109] See, *e.g.*, *Associated Gen. Contractors* v. *Coalition for Economic Equity*, 950 F.2d 1401, 1414 (1991) (municipal study showed that there "continued to operate an 'old boy network' in awarding contracts, thereby disadvantaging (minority firms)"), cert. denied, 503 U.S. 985 (1992); BBC Research & Consulting, *The City of Tuscon Disparity Study* 202 (1994) (citing "numerous detailed examples of the exclusionary operation of good old boy networks"); National Economic Research Associates, *The Utiliza-*

Ultimately, exclusion from business networks "isolate(s minorities) from the 'web of information' which flows around opportunities" thereby putting them at a distinct disadvantage relative to nonminority firms.[110] In government contracting, this disadvantage can be fatal: "(government) vendors who do get contracts, experts agree, have obtained vital bits of information their competitors either ignored or couldn't find. * * * (O)nly the well connected survive."[111]

Restricted access to business networks can particularly disadvantage minorities in the planning stages of government procurement. In designing contracts for public bidding, agencies commonly consult businesses to make sure that specifications match available services. Only bidders who meet the specifications may compete for the contract

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tion of Minority and Women Owned Business Enterprises by the Southeastern Pennsylvania Transportation Authority 107 (1993) (exclusion from 'old-boy' networks "was the most frequently cited problem" of minority and women-owned firms); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward* 6-14 (1993) ("75 percent of the witnesses cited problems breaking into established 'old-boy' networks".).

[110] *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (finding that district court's "failure to order (word-of-mouth recruitment practices) to be supplemented by affirmative action * * * was clearly an abuse of power"). See National Economic Research Associates, *Availability and Utilization of Minority and Women Owned Business Enterprises at the Massachusetts Water Resources Authority* 74 (1990) (finding that minorities "need to spend much more time and money on marketing because they do not have established networks and reputations"); Minority Business Enterprise Legal Defense and Education Fund, *An Examination of Marketplace Discrimination in Durham County* 16 (1991) (citing "numerous allegations that black contractors * * * learned of bid opportunities much later than their white competitors that are tied into the 'good old boy' network").

[111] Kevin Thompson, *Taking the Headache Out of Government Contracts*, Black Enterprise 219 (1993).

and the exclusion of minority-owned businesses from planning and consultations can lead to specifications that are written so narrowly as to exclude minority bidders.[112] In addition, the failure to consult minority-owned businesses during the planning stages of procurement prevents them from mobilizing resources for the upcoming competition. As a committee of Congress recently reported, "(m)inorities and women are always left out in any kind of design or planning phase for these projects, and that is why when (they) first know about them * * * it is traditionally too late to get (their) forces and resources together to react."[113]

3. Discrimination in Bonding and By Suppliers

The competitiveness of bids on public and private contracts is not determined solely by the bidder's resources. Rather, competitiveness often hinges on the ability of the bidding company to obtain quality services from bonding companies and suppliers at a fair price. Here too, discrimination places minority firms at a disadvantage.

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[112] This is accomplished by, for example, specifying that bidders must use certain brand-name products available only to several companies, specifying a depth of contract experience that minority-owned firms can rarely provide, and bundling projects into large contracts that small minority-owned companies cannot perform. See, *e.g.*, H.R. Rep. No. 870, 103d Cong., 2d Sess. 14 (1994) (citing recommendation that agencies separate "contracts into smaller parts, so that M&WOSB's would be able to participate in those opportunities"); Mason Tillman Associates, *Sacramento Municipal Utility District: M/WBE Disparity Study* 146 (1992) (noting that, in many instances, contract specifications are written so narrowly that there are only a few firms that can do the job); Tuchfarber *et al.*, *City of Cincinnati: Croson Study* 153 (1992) ("Products specified in the Request for Proposals were so narrow that only one company that had exclusive distribution of the product specified could satisfy the contract.").

[113] H.R. Rep. No. 870, 103d Cong., 2d Sess. 13 (1994).

All contractors on federal construction, maintenance, and repair contracts valued at over $100,000 are required to secure a surety bond guaranteeing the performance of the contract.[114] To obtain bonding, most surety companies require that a firm present a record of experience to substantiate its ability to perform the job. This mandate often lands minorities in the middle of a vicious circle. Since a history of discrimination has prevented many minority companies from gaining experience in contracting, they cannot get bonding. And since they cannot get bonding, they cannot get experience. As Congress has recognized, this dilemma "serves to preclude equitable minority business participation in federal construction contracts."[115]

Congress also has realized that minorities are disadvantaged by their exclusion from business networks that facilitate bonding, because "firms tend to give performance and payment bonds to people they already know and not to the new business person, especially if the small business owner is a woman or of a racial or ethnic minority."[116] Furthermore, Congress has considered evidence indicating that bonding agents, like lenders, inject racial biases into the

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[114] 40 U.S.C. 270a-270e.

[115] United States Congress, *Federal Compliance to Minority Set-Asides: Report to the Speaker, U.S. House of Representatives, by the Congressional Task Force on Minority Set-Asides* 29 (1988). See also H.R. Rep. No. 870, 103d Cong., 2d Sess. 14 (1994) ("Inability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts."); *Minority Business Participation in Department of Transportation Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 159 (1985) (statement of Sherman Brown) ("Virtually everyone connected with the minority contracting industry * * * apparently agrees that surety bonding is one of the biggest obstacles in the development of minority firms.").

[116] H.R. Rep. No. 870, 103d Cong. 2d Sess. 15 (1994).

bonding process.[117] Evidence of discrimination in bonding also has been accumulated in a number of state and local studies.[118] These problems have made minority businesses significantly less able to secure bonding on equal terms with

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[117] See *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 2 (1993) (statement by Rep. Kweisi Mfume) ("Similarities between a banker's ability to make arbitrary credit decisions and a surety producer or an underwriter's capability of injecting personal prejudice into the bonding process are compelling indeed."); *City of Richmond* v. *J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 40 (1990) (statement of Andrew Brimmer); *id.* at 165-66 (statement of Edward Bowen); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. 107 (1988) (statement of Marjorie Herter) ("Discrimination against women and minorities in the bonding market is quite prevalent").

[118] See Division of Minority and Women's Business Development, *Opportunity Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State*, Executive Summary 57 (1992) (noting that 47 witnesses reported "specific incidents of racial discrimination * * * in attempting to secure performance bonds"); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by Alameda County* 202, 212 (June 1992) (nearly 50 percent of minority businesses reported experiencing bonding discrimination); National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses Enterprises by Costa County* 231, 241 (May 1992) (noting evidence of bonding discrimination); Board of Education of the City of Chicago, *Report Concerning Consideration of the Revised Plan for Minority and Women Business Enterprise Economic Participation* 316 (1991) ("Bonding is selectively and capriciously provided or denied with the decision being 85 percent subjective."); Mason Tillman Associates, *Sacramento Municipal Utility District, M/WBE Disparity Study* 119, 135-43 (1990) (noting evidence of bonding discrimination).

white-owned firms with the same experience and credentials. For example:

• A Louisiana study found that minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for over $1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level.[119]

• An Atlanta study found that 66 percent of minority-owned construction firms had been rejected for a bond in the last three years, 73 percent of those firms limited themselves exclusively to contracts that did not require bonding, and none of them had unlimited bonding capacity. By contrast, less than 20 percent of nonminority firms had unlimited bonding capacity.[120]

Another factor restricting the ability of minority-owned businesses to compete in both private and public contracting is discrimination allowing "non-minority subcontractors and contractors [to get] special prices and discounts from suppliers which [are] not available to [minority] purchasers."[121] This drives up anticipated costs, and therefore the bid, for minority-owned businesses. A recent survey reported that 56 percent of black business owners, 30 percent of Hispanic

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[119] D.J. Miller & Associates, *State of Louisiana Disparity Study* Vol. 2, pp. 35-57 (June 1991).

[120] Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. III, 131-38 (1990).

[121] *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.) cert. denied, 498 U.S. 983 (1990). Evidence of pricing discrimination outside the contracting setting indicates that the problem cuts across the economy. For example, a recent testing study of automobile purchases showed that, on average, black men were charged nearly $1,000 more for cars than white men. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

owners, and 11 percent of Asian business owners had experienced known instances of discrimination in the form of higher quotes from suppliers.[122] Numerous other state and local studies have reported similar findings.[123]

In one glaring case, a firm in Georgia began sending white employees to purchase supplies posing as owners of a white-owned company. The "white-front" routinely received quotes on supplies that were two thirds lower than those

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[122] National Economic Research Associates, *The Utilization of Minority and Woman-Owned Businesses by the Regional Transportation District (Denver Colorado): Final Report* 16-23 (1992).

[123] See National Economic Research Associates, *The State of Texas Disparity Study: A Report to the Texas Legislature* as Authorized by H.B. 2626, 73rd Legislature 148 (1994) (Hispanic business owner denied credit by supplier who told him that "we only sell on a cash basis to people of your kind"); D.J. Miller & Associates, *Disparity Study for Memphis/Shelby County Intergovernmental Consortium* 117 (1994) ("Other frequent complaints pertaining to informal barriers included being completely stopped by suppliers' discriminatory practices."); BBC Research Associates, *Disparity Study for the City of Fort Worth* IX-20 (1993) (citing evidence that suppliers discriminate against minorities by "refus[ing] to sell or sell [ing] at higher prices than [to] whites"); Division of Minority and Women's Business Development, *Opportunity Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State*, Executive Summary, 53 (1992) (53 witnesses reported "specific incidents of racial discrimination * * * where materials or equipment suppliers would not extend the same payment terms and discounts to them as they knew were being made available to white male owned contractors with the same financial histories"); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by Alameda County* 187 (1992) (41% of minority-owned business respondents reported experiencing discrimination in quotes from suppliers); *City of Dayton, Disparity Study* 101 (1991) (citing evidence of discriminatory pricing); D.J. Miller & Associates, *City of St. Petersburg Disparity Study* 39-40 (1990) ("Discrimination by suppliers has also prevented [minority-owned businesses] from entering successful bids."); Mason Tillman Associates, *Sacramento Municipal Utility District, M/WBE Disparity Study* 135-43 (1990).

quoted to the minority-owned parent company.[124] Another firm entered into a joint venture with a white firm and each obtained quotes from the same supplier for the same project. When the two firms compared the quotes, they discovered that those given to the minority-owned firm were so much higher than those given to his white joint venture partner that they would have added 40 percent to the final contract price.[125]

C. *Evidence of the Impact of Discriminatory Barriers on Minority Opportunity in Contracting Markets: State and Local Disparity Studies*

In recent years, many state and local governments have undertaken formal studies to determine whether there is evidence of racial discrimination in their relevant contracting markets that would justify the use of race-conscious remedial measures in their procurement activities. These studies—many of which have been cited in the previous sections of this memorandum—typically contain extensive statistical analyses that have revealed gross disparities between the availability of minority-owned businesses and the utilization of such businesses in state and local government procurement. Under the rules established by the Supreme Court in its 1989 *Croson* decision, which held that affirmative action at the state and local level is subject to strict scrutiny, such disparities can give rise to an inference of discrimination that can serve as the foundation of race-

[124] Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia* Pt. II, 76 (1990).

[125] BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-20 (1992).

conscious remedial measures in procurement.[126] The studies also generally contain anecdotal evidence and expert opinion, developed in hearings, surveys, and reports, that bring the statistical evidence to life and vividly illustrate the effects of discrimination on procurement opportunities for minorities.

The federal government obviously purchases some goods and services that state and local governments do not (*e.g.*, space shuttles, naval warships). For the most part, though, the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question whether the federal government has a compelling interest to take remedial action in its own procurement activities.[127] Accordingly, the Justice Department asked the Urban Institute (UI) to analyze the statistical findings in the studies. On the strength of the findings in 39 studies that it considered, UI has reached the following conclusions:[128]

[126] In describing what it takes for the government to establish a remedial predicate in procurement, the Court in *Croson* said that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509.

[127] The studies are also of particular relevance in assessing the compelling interest for congressionally-authorized affirmative action measures in programs that provide federal funds to state and local governments for use in their procurement.

[128] To date, UI has evaluated 56 of the studies. Ultimately, UI excluded 17 of the 56 studies from its analysis, on the grounds that those studies do not present disparity ratios; do not present tests of statistical significance or number of contracts; do not present separate results by industry; or do not present disparity ratios based on government contracting.

• The studies show underutilization by state and local governments of African American, Latino, Asian and Native American-owned businesses. The pattern of disparity across industries varies with racial and ethnic groups. However, the median disparity figures calculated by UI demonstrate disparities for all ethnic groups in every industry.[129]

• Minority-owned businesses receive on average only 59 cents of state and local expenditures that those firms would be expected to receive, based on their availability. The median disparities vary from 39 cents on the dollar for firms owned by Native Americans to 60 cents on the dollar for firms owned by Asian-Americans.

• Minority firms are underutilized by state and local governments in all of the industry groups examined: [c]onstruction, construction subcontracting, goods, professional services and other services. The largest disparity between availability and utilization was seen in the category of "other services," where minority firms receive 51 cents for every dollar they were expected to receive. The smallest disparity was in the category of construction subcontracting, where minority firms still receive only 87 cents for every dollar they would be expected to receive.

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[129] UI's findings of underutilization are predicated on two different measures: the median disparity ratio across all studies and the percent of studies reporting substantial underutilization (defined as a disparity ratio of less than 0.8). A disparity ratio is the proportion of government contracting received by minority-owned firms to the proportion of available firms that are minority-owned. Thus, a disparity ratio of 0.8 indicates that businesses owned by members of a minority group received only 80 cents of every dollar expected to be allocated to them based on their availability. UI's findings of disparity do not change substantially when analysis is limited to studies with either a large number of contracts or high availability. In fact, in most instances, the disparity between availability and utilization was greater in studies that involve large numbers of contracts.

An important corollary to UI's findings is the experience following the Supreme Court's 1989 ruling in *Croson*. In the immediate aftermath of that case, state and local governments scaled back or eliminated altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers to minority opportunity and to correct for chronic underutilization of minority firms. As a result of this retreat from affirmative action, minority participation in state and local procurement plummeted quickly. To cite just a few examples:

• After the court of appeals decision in *Croson* invalidating the City of Richmond's minority business program in 1987, minority participation in municipal construction contracts dropped by 93 percent.[130]

• In Philadelphia, public works subcontracts awarded to minority and women-owned firms declined by 97 percent in the first full month after the city's program was suspended in 1990.[131]

• Awards to minority-owned businesses in Hillsborough County, Florida, fell by 99 percent after its program was struck down by a court.[132]

• After Tampa suspended its program, participation in city contracting decreased by 99 percent for African American-owned businesses and 50 percent for Hispanic-owned firms.[133]

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[130] United States Commission on Minority Business Development, *Final Report* 99 (1992).

[131] *Id.*

[132] *Id.*

[133] *Id.*

• The suspension of San Jose's program in 1989 resulted in a drop of over 80 percent in minority participation in the city's prime contracts.[134]

Together, the information in the state and local studies, and the impact of the cut-back in affirmative action at the state and local level after *Croson*, provide strong evidence that further demonstrates the compelling interest for affirmative action measures in federal procurement. The information documents that the private discrimination discussed previously in part II of this memorandum—discrimination by trade unions, employers, lenders, suppliers, prime contractors, and bonding providers—substantially impedes the ability of minorities to compete on an equal footing in public contracting markets. And it these same discriminatory barriers that impair minority opportunity in federal procurement. The information also indicates that, without affirmative action, minorities would tend to remain locked out of contracting markets.

The information also helps to illuminate what it is that Congress is seeking to redress—and hence what interests are served—through remedial action in federal procurement. First, Congress has a compelling interest in exercising its constitutional power to remedy the impact of private discrimination on the ability of minority businesses to compete in contracting markets that is reflected in the studies. Second, Congress has a compelling interest in exercising its constitutional power to redress the statistical disparities reflected in the studies that give rise to an inference of discrimination by state and local governments, or at minimum suggest that those governments are compounding the impact of private discrimination through ostensibly neutral procurement prac-

[134] BPA Economics, *et al.*, *MBE/WBE Disparity Study for the City of San Jose*, Vol. III, 118-19 (1990).

tices that perpetuate barriers to minority contracting opportunity.[135] Finally, Congress has a compelling interest in ensuring that expenditures by the federal government do not inadvertently subsidize the discrimination by private and public actors that is reflected in the studies.[136] Were that to occur, the federal government would itself become a participant in that discrimination through procurement practices that serve to sustain impediments to minority opportunity in national contracting markets.

III. Conclusion

As a nation, we have made substantial progress in fulfilling the promise of racial equality. In contracting markets throughout the country, minorities now have opportunities from which they were wholly sealed off only a generation ago. Affirmative action measures have played an important part in this story. However, the information compiled by the Justice Department to date demonstrates that racial dis-

[135] The role of state and local governments in impeding contracting opportunities for minority firms is most directly addressed through federal programs that authorize recipients of federal funds to take affirmative action in their procurement activities. Those programs plainly are examples of the exercise of Congress' power under the Fourteenth Amendment to remedy discrimination by state and local governments. See *Adarand*, 115 S. Ct. at 2126 & n.9 (Stevens, J., dissenting). Since that same state and local conduct constitutes an impediment to minority opportunity in contracting markets in which the federal government does business, it also serves as a basis for affirmative action measures in the federal government's own procurement. Therefore, those measures too entail an exercise of Congress' authority under the Fourteenth Amendment. See *id.* at 2132 n.1 (Souter, J., dissenting) (for purposes of exercise of Congress' power under the Fourteenth Amendment, there is no difference between programs in which "the national government makes a construction contract directly" and programs in which "it funnels construction money through the states").

[136] See *Croson*, 488 U.S. at 492.

crimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets.

The evidence shows that the federal government has a compelling interest in eradicating the effects of two kinds of discriminatory barriers: first, discrimination by employers, unions, and lenders that has hindered the ability of members of racial minority groups to form and develop businesses as an initial matter; second, discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies that raises the costs of doing business for minority firms once they are formed, and prevents them from competing on an equal playing field with nonminority businesses. This discrimination has been, in many instances, deliberate and overt. But it also can take a more subtle form that is inadvertent and unconscious. Either way, the discrimination reflects practices that work to maintain barriers to equal opportunity.

The tangible effects of the discriminatory barriers are documented in scores of studies that reveal stark disparities between minority availability and minority utilization in state and local procurement. In turn, the disparities show that state and local governments themselves are tangled in this web through ostensibly neutral procurement actions that perpetuate the discriminatory barriers. The very same discriminatory barriers that block contracting opportunities for minority-owned businesses at the state and local levels also operate at the federal level. Without affirmative action in its procurement, the federal government might well become a participant in a cycle of discrimination.

Affirmative action in federal procurement is not the cure-all that will eliminate all the obstacles that racial discrimination presents for minority businesses. No one remedial tool can completely address the full dimension of this

problem. Laws proscribing discrimination and general race-neutral assistance to small businesses are critical to the achievement of these ends. But the evidence demonstrates that such measures cannot pierce the many layers of discrimination and its effects that hinder the ability of minorities to compete in our nation's contracting markets. Thus, there remains today a compelling interest for race-conscious affirmative action in federal procurement.

APPENDIX G

SELECTED HEARINGS AND REPORTS, 1972-1995

1. *Minority Small Business Enterprise: Report of the Subcomm. on Minority Small Business Enterprise to the House Select Comm. on Small Business*, H.R. Rep. No. 1615, 92d Cong., 2d Sess. (1972) (findings and conclusions leading to creation of a permanent select committee).

2. *Government Minority Enterprise Programs—Fiscal Year 197*: *Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. (1973).

3. *Government Minority Enterprise Programs—Fiscal Year 1974*: *Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 2d Sess. (1974).

4. *Minority Enterprise and Allied Problems of Small Business*: *A Report of the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975).

5. *Summary of Activities*: *A Report of the House Committee on Small Business*, 94th Cong., 2d Sess. 182 (1977).

6. *Minority Subcontracting: Joint Hearing Before the Senate Select Comm. on Small Business and Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business*, 95th Cong., 2d Sess. (1978).

7. *To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program*: *Hearings on H.R. 5612 Before the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. (1980).

8. *Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981).

9. *Small and Minority Business in the Decade of the 80's*: *Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. (Pt. 1 1981).

10. *Hearings on Minority Business and its Contributions to the U.S. Economy of the Senate Comm. on Small Business*, 97th Cong., 2d Sess. (1982).

11. *Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983).

12. *Hearings on the State of Hispanic Small Business in America Before the Subcomm. on Small Business*, 99th Cong., 2d Sess. (1985).

13. *Minority Enterprise and General Small Business Problems*: *Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 2d Sess. (1986).

14. *To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Small Business Comm.*, 100th Cong., 1st Sess. (1987).

15. *A Bill to Reform the Capital Ownership Development Program*: *Hearings on H.R. 1807 Before the House Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1987).

16. *Minority Business Development Act: Hearings Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1987).

17. *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987).

18. *The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. (1988).

19. *Twenty Years After the Kerner Commission: The Need for a New Civil Rights Agenda: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988).

20. *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988).

21. *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the House Comm. on Small Business*, 101 Cong., 1st Sess. (1989).

22. *Implementation of Small Business Subcontracting Program: Hearing Before the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988).

23. City of Richmond *v.* J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. of Small Business, 101st Cong., 2d Sess. (1990).

24. *The Meaning and Significance for Minority Business of the Supreme Court Decision in the* City of Richmond *v.* J.A. Croson: *Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. (1990).

25. *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991).

26. *Fiscal Economic and Social Crises Confronting American Cities: Hearings before the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 2d Sess. (1992).

27. *Small Business Development: Hearing Before the Subcomm. on Procurement, Tourism and Rural Development of the House Comm. on Small Business*, 102d Cong., 2d Sess. (1992).

28. *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Gov't Operations*, 103d Cong., 1st Sess. (1993).

29. *Government Accounting Office Report, Problems Continue with SBA's Minority Business Development Program* (Sept. 1993).

30. *SBA's Minority Business Development: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993)

31. *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the Comm. on Small Business*, 103d Cong., 1st Sess. (1993).

32. *Discrimination in Surety Bonding, Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993).

33. *The SBA's 8(a) Minority Business Development Program: Hearing Before the Senate Comm. on Small Business*, 104th Cong., 1st Sess. (1995).

APPENDIX H

HEARINGS ON THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

1. *Implementation of the Surface Transportation Assistance Act of 1982: Hearing Before the Senate Comm. on the Environment and Public Works*, 98th Cong., 2d Sess. (1984).

2. *Review of the 10-Percent Set Aside Program, Section 105(f) of the Surface Transportation Assistance Act of 1982: Hearing Before the House Comm. on Small Business*, 98th Cong., 2d Sess. (1984).

3. *Surface Transportation Issues: Hearing Before the House Comm. on Public Works and Transportation*, 98th Cong., 2d Sess. (1984).

4. *Review of 10-Percent Set Aside Program (Section 105(f)) of the Surface Transportation Assistance Act of 1982: Hearing Before the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985).

5. *Minority Business Participation in Department of Transportation Projects: Hearing Before the House Comm. on Government Operations*, 99th Cong., 1st Sess. (1985).

6. *The Disadvantaged Enterprise Program of the Federal Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 10 (1985).

7. *Minority Business Participation in Department of Transportation Projects: Hearing Before the House Comm. on Government Operations*, 99th Cong., 1st Sess. (1985).

APPENDIX I

HEARINGS AND REPORTS IN CONNECTION WITH ISTEA AND TEA-21

1. *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988).

2. *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988).

3. *Surety Bonds and Minority Contractors: Hearing Before the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988).

4. *Subcontracting with Small and Disadvantaged Businesses: GSA Subcontracting with Small and Disadvantaged Businesses: Hearing Before the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988).

5. *Minority Business Set-Aside Programs: Hearing Before the House Judiciary Comm.*, 101st Cong., 1st Sess. (1990).

6. *Problems with Equal Employment Opportunity and Minority and Women Contracting at Federal Agencies: Hearing Before the House Comm. Banking, Finance and Urban Affairs*, 102d Cong., 2d Sess. (1992).

7. *Discrimination in Surety Bonding: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993).

8. *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993)

9. *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993).

10. *Access to Credit in Distressed Communities: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993).

11. *Availability of Credit to Minority and Women-Owned Business: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking*, 103d Cong., 2d Sess. (1994).

12. *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm.*, 105th Cong., 1st Sess. (1997) (attaching "Proposed Reforms to Affirmative Action In Federal Procurement: A Preliminary Survey," 61 Fed. Reg. 26,041 (May 23, 1996)).

APPENDIX J

WEST DOLORES CONTRACT
[Excerpts]

Contract No. DTFH68-89-C-90015
Account No. 191-16-08-54-0602-002

Department of Transportation
Federal Highway Administration
Central Federal Lands Highway Division

Colorado FH 60-2(2)
West Dolores

Proposal and Contract

This contract cites Federal Highway Administration
Specifications FP-85, 1985

Proposal of Mountain Gravel & Construction Co.

Address P.O. Box 788, Dolores, CO 81323

BEST AVAILABLE COPY

SOLICITATION, OFFER, AND AWARD (Construction, Alteration, or Repair)	1. SOLICITATION NO.	2. TYPE OF SOLICITATION	3. DATE ISSUED	PAGE OF PAGES
	CO FH 60-2(2)	[X] SEALED BID (IFB) [ ] NEGOTIATED (RFP)	8/10/89	1 of 3

IMPORTANT – The "offer" section on the reverse must be fully completed by offeror.

4. CONTRACT NO.	5. REQUISITION/PURCHASE REQUEST NO.	6. PROJECT NO.
DTFH68-89-C-90016 (C-1675-915)		CO FH 60-2(2)

7. ISSUED BY CODE	8. ADDRESS OFFER TO
U.S. Department of Transportation Federal Highway Administration Central Federal Lands Highway Division P.O. Box 25246 Denver, CO 80225	Jerry L. Budwig, Division Engineer Federal Highway Administration Central Federal Lands Highway Division P.O. Box 25246 Denver, Colorado 80225 OR * Hand carry to address below

9. FOR INFORMATION CALL:	A. NAME	B. TELEPHONE NO. (Include area code) (NO COLLECT CALLS)
	See continuation of SF 1442	

SOLICITATION

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

10. THE GOVERNMENT REQUIRES PERFORMANCE OF THE WORK DESCRIBED IN THESE DOCUMENTS (Title, identifying no., date):

for construction of Colorado FH 60-2(2), West Dolores, in strict accordance with:

1. FAR CONTRACT CLAUSES
2. MINIMUM WAGE SCHEDULE
3. STANDARD SPECIFICATIONS FOR CONSTRUCTION OF ROADS AND BRIDGES ON FEDERAL HIGHWAY PROJECTS, FP-85 (1985), INCLUDING ERRATA
4. SPECIAL CONTRACT REQUIREMENTS
5. BID SCHEDULE
6. PLANS CONSISTING OF 50 PAGES.

* HAND CARRY BIDS TO:
Jerry L. Budwig, Division Engineer
Federal Highway Administration
Central Federal Lands Highway Division
555 Zang Street - 4th Floor
Lakewood, Colorado 80228

11 The Contractor shall begin performance within 10 calendar days and complete it within 240 calendar days after receiving [ ] award, [X] notice to proceed. This performance period is [X] mandatory, [ ] negotiable. (See _____)

12A. [illegible] (If "YES," indicate within how many calendar days after award in item 12B.)	12B. CALENDAR DAYS
[X] YES [ ] NO	13

13. ADDITIONAL SOLICITATION REQUIREMENTS

A. Sealed offers in original and 0 copies to perform the work required are due at the place specified in item 8 by 2 p.m. (hour) local time 9/12/89 (date). If this is a sealed bid solicitation, offers will be publicly opened at that time. Sealed envelopes containing offers shall be marked to show the offeror's name and address, the solicitation number, and the date and time offers are due.

B. An offer guarantee [X] is, [ ] is not required. See continuation of SF 1442

C. All offers are subject to the (1) work requirements, and (2) other provisions and clauses incorporated in the solicitation in full text or by reference.

D. Offers providing less than 35 calendar days for Government acceptance after the date offers are due will not be considered and will be rejected.

NSN 7540-01-155-3212 1442-102 STANDARD FORM 1442 (REV. 4-85) Prescribed by GSA FAR (48 CFR) 53.236-1(d)

OFFER (Must be fully completed by offeror)

14. NAME AND ADDRESS OF OFFEROR (Include ZIP Code)	15. TELEPHONE NO. (Include area code)
MOUNTAIN GRAVEL & CONSTRUCTION CO. PO BOX 758 DOLORES, CO 81323	303 882 7232
	16. REMITTANCE ADDRESS (Include only if different than Item 14)
CODE FACILITY CODE	

17. The offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of this solicitation, if this offer is accepted by the Government in writing within _____ calendar days after the date offers are due. (Insert any number equal to or greater than the minimum requirement stated in Item 12D. Failure to insert any number means the offeror accepts the minimum in Item 12D.

AMOUNTS ▶ See bid schedule

18. The offeror agrees to furnish any required performance and payment bonds.

19. ACKNOWLEDGMENT OF AMENDMENTS
(The offeror acknowledges receipt of amendments to the solicitation — give number and date of each)

AMENDMENT NO.	1	2	3							
DATE	9-1-89	9-2-89	9-6-89							

20A. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)	20B. SIGNATURE	20C. OFFER DATE
Sue Martin	Asst. Vice Pres.	9-12-89

AWARD (To be completed by Government)

21. ITEMS ACCEPTED:

All, Schedule A

22. AMOUNT	23. ACCOUNTING AND APPROPRIATION DATA
$3,267,704.35	

24. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified)	ITEM 26	25. OTHER THAN FULL AND OPEN COMPETITION PURSUANT TO ☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c)( )
26. ADMINISTERED BY CODE		27. PAYMENT WILL BE MADE BY
See continuation of SF 1442		Federal Highway Administration Office of Fiscal Services - Finance Division Room 4311, HFS-20 400 Seventh Street, S.W. Washington, DC 20590

CONTRACTING OFFICER WILL COMPLETE ITEM 28 OR 29 AS APPLICABLE

☐ 28. NEGOTIATED AGREEMENT (Contractor is required to sign this document and return _____ copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all work requirements identified on this form and any continuation sheets for the consideration stated in this contract. The rights and obligations of the parties to this contract shall be governed by (a) this contract award, (b) the solicitation, and (c) the clauses, representations, certifications, and specifications incorporated by reference in or attached to this contract.

☒ 29. AWARD (Contractor is not required to sign this document.) Your offer on this solicitation is hereby accepted as to the items listed. This award consummates the contract, which consists of (a) the Government solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

30A. NAME AND TITLE OF CONTRACTOR OR PERSON AUTHORIZED TO SIGN (Type or print)	30B. SIGNATURE	30C. DATE
N/A	N/A	

31A. NAME OF CONTRACTING OFFICER (Type or print)	31B. SIGNATURE	31C. AWARD DATE
Jerry L. Budwig	BY	9/15/89

GPO : 1988 O - 202-792 STANDARD FORM 1442 BACK (REV. 4-85)

* * * * *

D-7

52.219-1

SMALL BUSINESS CONCERN REPRESENTATION. (MAY 1986)

The offeror represents and certifies as part of its offer that it [✓] is, [ ] is not a small business concern and that [ ] all, [✓] not all end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands. "Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

SMALL BUSINESS CONCERN REPRESENTATION FOR THE SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM (DEC 1988), ALTERNATE I

(a) Definition.
"Emerging small business", as used in this solicitation, means a small business concern whose size is no greater than 50 percent of the numerical size standard applicable to the standard industrial classification code assigned to a contracting opportunity.

(b) (Complete only if Offeror has certified itself under the clause at FAR 52.219-1 as a small business concern under the size standards of this solicitation.)
The Offeror represents and certifies as part of its offer that it [ ] is, [✓] is not an emerging small business.

(c) (Complete only if the Offeror is a small business or an emerging small business, indicating its size range.)
Offeror's average annual gross revenue for the last three fiscal years. (Check one of the following.)
Average annual gross revenues

___ $1 million or less
___ $1,000,001 - $2 million
___ $2,000,001 - $3.5 million
___ $3,500,001 - $5 million
___ $5,000,001 - $10 million
✓ $10,000,001 - $17 million
___ Over $17 million

52.219-2

SMALL DISADVANTAGED BUSINESS CONCERN REPRESENTATION. (APRIL 1984)

(a) Representation. The offeror represents that it [ ] is, [✓] is not a small disadvantaged business concern.

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* * * * *

F-13

52.219-9

SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS
SUBCONTRACTING PLAN. (APRIL 1984) ALTERNATE 1 (APRIL 1984)

(a) This clause does not apply to small business concerns.

(b) "Commercial product," as used in this clause, means a product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices. It also means a product which, in the opinion of the Contracting Officer, differs only insignificantly from the Contractor's commercial product.
"Subcontract," as used in this clause, means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which addresses separately subcontracting with small business concerns and small disadvantaged business concerns, and which shall be included in and made part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

(d) The offeror's subcontracting plan shall include the following:
(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns and small disadvantaged business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.
(2) A statement of--
(i) Total dollars planned to be subcontracted;
(ii) Total dollars planned to be subcontracted to small business concerns; and
(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns.
(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns and (ii) small disadvantaged business concerns.
(4) A description of the method used to develop the subcontracting goals in (1) above.
(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Automated Source System (PASS) of the Small Business Administration, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small and small disadvantaged business concerns trade associations).

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with (i) small business concerns and (ii) small disadvantaged business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small business concerns and small disadvantaged business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) who receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror.

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports in order to allow the Government to determine the extent of compliance by the offeror with the subcontracting plan, (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms, and (iv) ensure that its subcontractors agree to submit Standard Form 294 and 295.

(11) A recitation of the types of records the offeror will maintain to demonstrate procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of its efforts to locate small and small disadvantaged business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists, guides, and other data that identify small and small disadvantaged business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small or small disadvantaged business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than $100,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) whether small disadvantaged business concerns were solicited and if not, why not, and (C) if applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact (A) trade associations, (B) business development organizations, and (C) conferences and trade fairs to locate small and small disadvantaged business sources.

(v) Records of internal guidance and encouragement provided to buyers through (A) workshops, seminars, training, etc., and (B) monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having company or division-wide annual plans need not comply with this requirement.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small business and small disadvantaged business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small business and small disadvantaged subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small business and small disadvantaged business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small and small disadvantaged business firms.

(f) A master subcontracting plan on a plant or division-wide basis which contains all the element required by (d) above, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided, (1) the master plan has been approved, (2) the offeror provides copies of the approved master plan and evidence of its approval to the Contracting Officer, and (3) goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

(g) (1) If a commercial product is offered, the subcontracting plan required by this clause may relate to the offeror's production generally, for both commercial and noncommercial products, rather than solely to the Government contract. In these cases the offeror shall, with the concurrence of the Contracting Officer, submit one company-wide or division-wide annual plan.

(2) The annual plan shall be reviewed for approval by the agency awarding the offeror its first prime contract requiring a subcontracting plan during the fiscal year, or by an agency satisfactory to the Contracting Officer.

(3) The approved plan shall remain in effect during the offeror's fiscal year for all of the offeror's commercial products.

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.

52.219-13

UTILIZATION OF WOMEN-OWNED SMALL BUSINESSES. (AUGUST 1986)

(a) "Woman-owned small businesses," as used in this clause, means small business concerns that are at least 51 percent owned by women who are United States citizens and who also control and operate the business.
"Control," as used in this clause, means exercising the power to make policy decisions.
"Operate," as used in this clause, means being actively involved in the day-to-day management of the business.
"Small business concern," as used in this clause, means a concern including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR 121.

(b) It is the policy of the United States that women-owned small businesses shall have the maximum practicable opportunity to participate in performing contracts awarded by any Federal agency.

(c) The Contractor agrees to use its best efforts to give women-owned small businesses the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with the efficient performance of its contract.

(d) The Contractor may rely on written representations by its subcontractors regarding their status as women-owned small businesses.

52.219-16

LIQUIDATED DAMAGES - SMALL BUSINESS SUBCONTRACTING PLAN (AUGUST 1989)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Business and Small Disadvantaged Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its

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No. 00-730

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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27 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Supplemental Statement of Facts	1
Argument in Reply	4
I. Continuing Lack of Equal Footing Ensures Standing	4
A. Despite The Benchmark Study, DOT Still Harms Adarand With Compulsory DBE Subcontracting Plans	4
B. Adarand Did Not Waive Standing	7
II. The Record Contains No Evidence Of Compelling Interest	9
III. The Record Contains No Evidence Of Narrow Tailoring	16
Conclusion	20

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

City of Edmond v. Robinson, 517 US 1201 (1996) 6

H.L. v. Matheson, 450 US 398 (1981) 7

Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 US 264 (1981) 11

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 US 574 (1986) 19

Nelson v. Adams USA, Inc., 529 US 460 (2000) 8

Northeastern Fla. Chapter, Assoc'd Gen. Contractors of Am. v. Jacksonville, 508 US 656 (1993) 6

Pennell v. City of San Jose, 485 US 1 (1988) 1

Turner Broad. Sys., Inc. v. FCC, 520 US 180 (1997) 12

United States v. Doe, 465 US 605 (1984) 9

United States v. Hays, 515 US 737 (1995) 7

Warth v. Seldin, 422 US 490 (1975) 1, 8

FEDERAL CIRCUIT COURT CASES

Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997) 19

Athens Lumber Co., Inc. v. Federal Election Com'n, 689 F.2d 1006 (11th Cir. 1982) 4

Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. July 6, 2001) 10, 11

Frank v. United States, 78 F.3d 815 (2nd Cir. 1996) 7

Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995) 8

TABLE OF AUTHORITIES – Continued

Page

Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) 4

Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) 4

Riggs v. City of Albuquerque, 916 F.2d 582 (10th Cir. 1990) 8

Rothe Dev. Corp. v. United States Department of Defense, 2001 WL 936318 (Fed. Cir. Aug. 20, 2001) 10, 12

FEDERAL DISTRICT COURT CASES

Associated General Contractors of America v. City of Columbus, 936 F.Supp. 1363 (S.D. Ohio 1996), *vacated on jurisdictional grounds*, 172 F.3d 411 (6th Cir. 1999) 15

Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F.Supp.2d 1042 (D. Colo. 2000) 14

Webster v. Fulton County, 51 F.Supp.2d 1359 (N.D. Ga. 2000), *aff'd*, 218 F.2d 1276 (11th Cir. 2000) 14

STATUTES

Securities and Exchange Act of 1934 (as amended), 15 USC §§ 78*m*, 78*o* 2

Small Business Act (as amended), 15 USC § 637(d) ...2, 5

Transportation Equity Act for the Twenty-First Century, Pub. L. 105-178, 112 Stat. 113 (June 9, 1998) 2, 13

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

13 CFR § 121.103 (2001) 2

13 CFR § 121.104 (2001) 2

13 CFR § 121.201 (2001) 2

13 CFR § 124.1002 (2001) 2

48 CFR § 19.201 (2000) 5, 7

48 CFR § 19.1103 (2000) 6

48 CFR § 26.7 (2000)..... 2

48 CFR § 52.219-9 (2000).....1, 2, 5, 8

48 CFR § 52.219-16 (2000)..... 1, 2, 5

48 CFR § 52.219-23 (2000)..... 6

48 CFR § 705-4 (2000) 2

48 CFR § 705-5 (2000) 2

48 CFR § 19.702 (2000) 2, 5

48 CFR § 19.708 (2000) 5

49 CFR § 26.45 (2000) 18

RULES OF PROCEDURE AND EVIDENCE

Fed. R. Evid. 201 1

FEDERAL REGISTER ENTRIES AND OTHER OFFICIAL REPORTS

45 Fed. Reg. 42832 (April 9, 1980) 14

64 Fed. Reg. 52806 (Sept. 30, 1999)..... 7

TABLE OF AUTHORITIES – Continued

Page

65 Fed. Reg. 52470 (August 29, 2000) 2

66 Fed. Reg. 23208 (May 8, 2001) 18

Benchmark Study, 63 Fed. Reg. 35714 (June 30, 1998).....6, 13

Executive Order No. 13170, 65 Fed. Reg. 60827 (Oct. 12, 2000).....5, 16

LEGISLATIVE HISTORY

Government Accounting Office Report on Disadvantaged Business Enterprise Programs, 147 Cong. Rec. S7078-79 (June 28, 2001)..... 14

H. Rep. No. 95-949 (1978)..... 19

TREATISES

Wayne H. LaFave, *et al.*, *Criminal Procedure* § 10.3(b) (2nd Ed. 1999) 11

SUPPLEMENTAL STATEMENT OF FACTS

Respondents once again assert that Adarand lacks standing, Brief for the Respondents (Resp.) 17, thereby compelling Adarand to heed this Court's "strong[ ] suggest[ion]" to "take pains to supplement the record in any manner necessary to enable [this Court] to address [the] question of standing with as much precision as possible." *Pennell v. City of San Jose*, 485 US 1, 8 (1988); *Warth v. Seldin*, 422 US 490, 501 (1975). Accordingly, Adarand lodges with this Court a series of public records that pertain to standing, provides this supplemental statement of facts, and devotes a substantial portion of this Reply to refuting Respondents' meritless contentions in this regard.

In the year and half since this Court last ruled in this case, DOT has let at least three Colorado contracts that are directly relevant to standing in this case: the Dolores-Rico Project, the Mesa Verde Main Entrance Road Project, and the Taylor River Road Project. Exs. A-C.[1] The Proposal or Invitation for Bid for all three projects included two key contract provisions: 48 CFR § 52.219-9 ("Small Business Subcontracting Plan") and 48 CFR § 52.219-16 ("Liquidated Damages – Subcontracting Plan"). Exs. A 61; B 246; C 391. Those clauses execute the provisions of section 8(d)(4) and 8(d)(6) of the Small Business Act that require ordinary prime contractors on ordinary prime contracts to submit plans to hire racially-

---

[1] All references to Exhibits refer to Petitioners Lodging. These public records reproduced are obtainable by FOIA or open records requests to DOT, the General Accounting Office (GAO), the Securities and Exchange Commission (SEC), and the Colorado Department of Transportation. In the context of this brief, the accuracy of these sources cannot reasonably be questioned. Since the documents therefore contain facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the facts are suitable for judicial notice. Fed. R. Evid. 201.

defined Disadvantaged Business Enterprises (DBEs) as subcontractors, instead of companies like Adarand.[2] 15 USC §§ 637(d)(4)(F), (d)(8); 48 CFR §§ 19.702, 705-4, 705-5, 52.219-9, 52.219-16. The same clauses were present in the West Dolores River contract underlying this case. Resp. 90a-100a; 202a-205a. As Respondents concede, these clauses apply unless the prime contract is a particularly small one (under $1 million) or the prime contractor is an SBA-certified small business concern. Resp. 8. When the clauses apply, failure to submit such a DBE subcontracting plan renders a prime contractor ineligible for award of the prime contract, and failure to execute the plan in good faith is punishable by liability for liquidated damages. *Id.*

As second lowest bidder, Mountain Gravel and Construction Company nearly won the Dolores-Rico project. Ex. D. Mountain Gravel is the same prime contractor that awarded the guardrail subcontract on the West Dolores River Project to a DBE instead of Adarand in 1989, spawning this litigation. Pet. App. 209. Mountain Gravel is not a small business concern.[3] Accordingly, Mountain Gravel would have been ineligible to compete for the prime contract if it had not submitted a plan to hire DBE subcontractors instead of Adarand. 48 CFR § 19.702(a)(2).

With a low bid of just under $4.4 million, Nielson's, Inc. won the Dolores-Rico prime contract on February 24, 2000. Exs. D, G. Nielson's, Inc. also won the Mesa Verde

---

[2] "Small Disadvantaged Businesses" (SDBs) are functionally equivalent to DBEs in all respects pertinent to this case. Petitioner's Brief on the Merits 8-9, 9 n.5; Resp. 8, 8 n.1; 13 CFR § 124.1002 (2001); 48 CFR § 26.7 (2000). For purposes of this Reply, therefore, references to "DBEs" include "SDBs."

[3] Mountain Gravel is owned by CRH plc, a conglomerate with billions of dollars in annual revenues during the relevant period. Ex. L 763, 823, 842 (SEC form 20F annual report of CRH required by 15 USC §§ 78*m*, 78*o*); 13 CFR §§ 121.103, 121.201, 121.104(b); Pub. L. 105-178 § 1102(b)(2)(A); 65 Fed. Reg. 52470 (August 29, 2000).

Main Entrance prime contract on September 28, 2000 with a low bid of over $2.7 million. Exs. E, H. Neilson's is not a small business concern. Exs. G 722; H 732. Because neither Nielson's nor the projects it won were small, DOT required Nielson's to submit and abide by a DBE subcontracting plan for each project on pain of potentially hefty fines. Nielson's complied. Ex. I. The two projects included $59,220.00 and $36.900.00 in guardrail subcontracting opportunities, respectively. *See* Engineer's Estimates: Exs. D 654, 660; E 674, 685, 696. In its DBE subcontracting plans, Nielson's represented that in order to fulfill its contractual and statutory obligations, Nielson's would hire DBE-certified Gonzalez Construction for both guardrail subcontracts. Exs. I 738; J 746. Gonzalez Construction is the same DBE to whom Mountain Gravel awarded the West Dolores River guardrail subcontract in 1989. Pet. App. 209. Adarand submitted bids to Nielson's for both subcontracts, but Nielson's executed its compulsory plan and hired Gonzalez instead, twice. Ex. M, ¶¶ 7, 9.

Weeminuche Construction Authority won the Taylor River Road prime contract with a bid of approximately $5.9 million on August 27, 2001. Ex. K. Weeminuche is not a small business concern and therefore was also required to submit a DBE subcontracting plan and execute it in good faith. The Appendix to the Invitation to Bid even included a detailed sample of such a plan. Ex. C 641, *et seq*. The Taylor River Road project included $33,750.00 in guardrail subcontracting opportunities. Ex. F 704, 709. Adarand submitted a bid, but Weeminuche hired Gonzalez instead. Ex. M, ¶¶ 8, 9.

Adarand continues to bid for virtually all guardrail opportunities for which it is permitted to bid. Ex. M. ¶ 6. *See infra*, n.8. Adarand also continues to compete with and lose business to Gonzalez and other DBEs. Ex. M, ¶ 9.

ARGUMENT IN REPLY

I. Continuing Lack of Equal Footing Ensures Standing.

Rejecting Respondents' standing challenge in 1995, this Court reiterated that "the injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing." Pet. App. 210. Because Adarand seeks only prospective relief, this Court explained, the only question as to standing is "whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract" that includes artificial motivation to hire DBEs instead of Adarand.[4] Pet. App. 211. Accordingly, this Court held that Adarand has standing because: (1) DOT "is likely to let contracts involving guardrail work" that contain such artificial motivation "at least once per year in Colorado"; and (2) Adarand is "very likely" to compete with DBEs to win that work. Pet. App. 212. Those findings remain true.

A. Despite The Benchmark Study, DOT Still Harms Adarand With Compulsory DBE Subcontracting Plans.

Respondents attempt to escape the scrutiny of this Court by insisting: "[i]n the context of direct federal procurement . . . DOT *precludes* the use of race-based criteria *unless* the Department of Commerce's benchmark

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[4] For purposes of standing analysis, surely, there is no legally cognizable difference between the incentive of offering more money for hiring DBEs, like SCC clauses, and a threat of taking money away, like liquidated damages clauses. In fact, the threat *is* an incentive. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1460 n.6 (9th Cir. 1986) ("the threat of governmental suit would still serve as an incentive"); *Hitchcock v. Wainwright*, 770 F.2d 1514, 1525 (11th Cir. 1985) ("legislative use of . . . threat as an incentive"); *Athens Lumber Co., Inc. v. Federal Election Com'n*, 689 F.2d 1006, 1014 (11th Cir. 1982) ("he is subject to the same threat of . . . penalties and therefore has equal incentive").

study finds disparities in the relevant market." Resp. 37 (emphasis in original). Although their brief is peppered with such statements, *e.g.* Resp. 3, 7, 9, 10, 17, 22, 23, 36, 37, 38, 42, 46, repetition does not cure mistake. In reality, current federal law still threatens prime contractors with financial liability if they fail to attempt to hire DBEs instead of Adarand, despite the Benchmark Study. Respondents admit section 8(d)(4) requires DBE subcontracting plans from ordinary prime contractors on ordinary prime contracts. Resp. 8. Respondents also admit that failure to execute such plans in good faith exposes prime contractors to liquidated damages, and that 48 CFR section 19.201(b) governs the effects of the Benchmark Study.[5] Resp. 8, 9; *compare* Brf. 14. Contrary to Respondents' contentions, however, that regulation makes plain that the Benchmark Study has no effect whatsoever on the compulsory nature of DBE subcontracting plans. Instead, the Benchmark Study purportedly determines only whether "a price evaluation adjustment . . . an evaluation factor . . . and monetary subcontracting incentive clauses" like the SCC are "authorized." 48 CFR § 19.201(b). Compulsory DBE subcontracting plans are not mentioned. *Id.* Nor do Respondents ever provide any citation for their insistence that the Benchmark Study bars such plans. Furthermore, DOT is under Executive Order to enforce liquidated damages provisions aggressively. EO 13170 § 2(a)(xi), 65 Fed. Reg. 60827 (Oct. 12, 2000). The Dolores-Rico, Mesa Verde Main Entrance, and Taylor River Road projects demonstrate beyond dispute that DBE subcontracting plans remain compulsory today.[6] Adarand obviously cannot compete

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[5] *See also* Defendants' Answers to Plaintiff's Second Set of Interrogatories no.6 (Exhibit H to Plaintiff's Motion for Summary Judgment, filed May 2, 1996); 15 USC § 637(d)(4)(B, F), (d)(8); 48 CFR §§ 19.702, 19.708(b)(2), 52.219-9, 52.219-16.

[6] It also appears that the Benchmark Study did not really prohibit the use of price evaluation adjustments for DBEs in

on an equal footing when prime contractors must seek to hire Adarand's DBE-certified competitors just to avoid fines. Because DOT let all three projects in the past eighteen months, moreover,[7] compulsory DBE subcontracting plans remain likely to prevent Adarand from competing on an equal footing "at least once per year." This likelihood is sufficient to support standing, regardless of whether Adarand or a DBE was low bidder. Pet. App. 210, 212; *Northeastern Fla. Chapter, Assoc'd Gen. Contractors of Am. v. Jacksonville*, 508 US 656, 666 (1993).[8]

Colorado, as it should have. The Proposal or Invitation to Bid for all three recent, post-Benchmark direct-procurement Colorado projects included the contract clause set forth at 48 CFR § 52.219-23 ("Notice of Price Evaluation Adjustment For Small Disadvantaged Business Concerns (Oct. 1999) 10%"). *See* 48 CFR § 19.1103.

[7] The scope of this inquiry seems best limited to the eighteen months that have elapsed since this Court last ruled in this case because in that decision, this Court at least implicitly acknowledged Adarand's continuing standing to sue. The Benchmark Study putatively deprived Adarand of standing starting June, 30 1998. 63 Fed. Reg. 35714. In January 2000, however, this Court found the panel below had "confused mootness with standing." Pet. App. 108. Thus, in accordance with this Court's holdings that it must address standing "even if the courts below have not passed on it, and even if the parties fail to raise" it, *City of Edmond v. Robinson*, 517 US 1201, 1202 (1996), this Court considered standing as well as mootness before declaring "petitioner's cause of action remains alive." Pet. App. 111.

[8] Furthermore, Adarand maintains standing even if the Benchmark Study really did preclude the use compulsory DBE subcontracting plans because, as Respondents themselves pointed out to the panel below, the challenged presumptions also manifest themselves in set-asides for DBEs, for which Adarand is not even eligible to bid. Brief For The Federal Appellants 5 n.5, filed Nov. 13, 1997. Two such race-conscious "non-compete" set-asides valued between $600,000.00 and $3.5 million, are currently outstanding in Colorado. Ex. N. DOT's

B. Adarand Did Not Waive Standing.

Respondents claim Adarand somehow waived its own standing and may not now rely on compulsory DBE subcontracting plans as a basis for standing because, in their view, Adarand "did not properly challenge Sections 8(d)(4) through 8(d)(6) of the SBA in the courts below." Resp. 21. In contrast, this Court has held that "standing is not subject to waiver," *United States v. Hays*, 515 US 737, 742 (1995), and has explicitly cited section 8(d)(4) as a source of harm to Adarand, Pet. App. 105. Further, Respondents have confused the sufficiency of a challenge on the merits with the sufficiency of a basis for standing. Properly analyzed, "standing is a jurisdictional issue, separate and distinct from the merits." *H.L. v. Matheson*, 450 US 398, 430 (1981) (Marshall, J, with Brennan, J. and Blackmun, J., dissenting from denial of standing); *Frank v. United States*, 78 F.3d 815, 831 (2nd Cir. 1996). As a result, even if Adarand had never challenged the constitutional merits of compulsory subcontracting plans, this Court could still consider such plans for purposes of standing. In reality, moreover, Adarand did challenge such plans. Though Respondents seek to limit this case to the terms actually printed on the West Dolores River contract twelve years ago, Resp. 21, that contract included compulsory subcontracting plan and liquidated damages clauses, Resp. App. 202a-205a. Accordingly, Adarand's First Amended Complaint challenged the DBE subcontracting clause expressly.[9] Adarand has argued all

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racial scheme also includes mentor-protégé programs and financial assistance to state and local recipients. Neither is affected by the Benchmark Study. In any event, the purported restrictions on use of race-based contracting criteria are only temporary. Benchmark Studies are supposed to be performed "on an annual basis" and a new one is long overdue. 48 CFR § 19.201(b); 64 Fed. Reg. 52806 (Sept. 30, 1999).

[9] In reviewing a question of standing there is often no need to venture outside the allegations of the Complaint, which must

along, in fact (and Respondents admitted long ago) that *all* manifestations of the race-based presumptions of disadvantage are at issue in this case, including 8(d)(4) compulsory DBE subcontracting plans.[10] In light of the

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be treated as true and construed in favor of Adarand. *Warth v. Seldin*, 422 US 490, 501-02 (1975); *Riggs v. City of Albuquerque*, 916 F.2d 582, 587 (10th Cir. 1990) ("Because we do not need to go outside of plaintiffs' complaint to hold that plaintiffs have standing, the parties' attempts to supplement the record are unnecessary"). There is no such need in this case because here, the Complaint alleges: that the West Dolores River Project Proposal and Contract included the contract clause that calls for compulsory DBE subcontracting plans, 48 CFR § 52.219-9 (¶ 17, Resp. App. 202a); that use of that clause, among others, compels prime contractors to discriminate against non-DBE subcontractors like Adarand (¶ 19); that the question on the West Dolores River Project proposal, " 'subcontracting program required?' is marked neither 'yes' nor 'no' " (¶ 6); and that Mountain Gravel & Construction Company was compelled to award the subcontract to Gonzales Construction by the various terms of the contract (¶ 29). These allegations, certainly, were sufficient to meet this Court's requirement that in order to avoid waiver, the lower court need only "be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 US 460, 469-70 (2000). Further, the panel's conclusions regarding standing are immaterial because standing must be reviewed *de novo*. *Gilbert v. Shalala*, 45 F.3d 1391, 1393 (10th Cir. 1995); *compare* Resp. 14, 22.

[10] For example, Adarand argued below: "Adarand challenged, not just the Subcontracting Compensation Clause (SCC) . . . but also the federal statutes adopted by Congress and the implementing regulations adopted by the Executive[; a]ccordingly, Judge Kane held unconstitutional the entire scheme." Appellee's Response In Opposition To Appellant's Motion To Dismiss Appeal As Moot 2 n.1, filed September 4, 1998, and "the SCC is not the issue; the federal statutes are the issue; [w]hether Federal Defendants employ the SCC or drop it and employ some other device [such as compulsory DBE subcontracting plans] to implement these unconstitutional statutes is irrelevant," Adarand Constructors, Inc.'s

record and the law, therefore, Adarand cannot be held to have waived its standing.

II. The Record Contains No Evidence Of Compelling Interest.

Respondents' attempts to alter the standard of review and to narrow the scope of the case, Resp. 19, 25, need not long detain this Court because *certiorari* was granted for the express purpose reviewing the record *de novo* in order to address the constitutionality of the entire DBE program.[11] In the course of Respondents' discussion, moreover, they affirmatively concede several key points

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Supplemental Brief 13, filed April 4, 2000. Further, Respondents' assertion that Adarand did not challenge the panel's denial of standing to challenge 8(d)(4-6) mischaracterizes Adarand's Petition for *Certiorari*, which cites those provisions expressly and reiterates: "the SCC is not the federal program at issue in this case; [the SCC] is only a small part of the entire federal race-based highway construction contracting program, that is, one mechanism by which that program is implemented." Pet. 2, 3 n.1. In fact, Respondents themselves explained to the panel that the district court had held: "neither the SCC nor the various federal statutes incorporating the 8(d) presumption and setting goals for DBE participation in federal contracting were narrowly tailored." Motion By The Federal Appellants To Dismiss Appeal As Moot And To Vacate The District Court Judgment 3, filed Aug. 19, 1998. Such statutes indisputably include 8(d)(4-6)'s requirements for compulsory DBE subcontracting plans and liquidated damages.

[11] Though Respondents argue that this Court should be "reluctan[t] to disturb findings of fact in which two courts below have concurred," Resp. 25, the "traditional reluctance" to review factual conclusions regarding the sufficiency of evidence has no bearing on this case. Instead, this Court owes no deference to any factual finding that "has no support in the record," and granted *certiorari* for the express purpose of deciding whether the evidentiary standard was misapplied. *United States v. Doe*, 465 US 605, 614 (1984). Furthermore, though

and fail to deny others, further clarifying the parties' mutual agreement on seven major issues. First, Respondents make no attempt to argue that Congress' power to pass the DBE program is derived from section five of the Fourteenth Amendment. Their reliance on Congress' spending power instead, Resp. 35, only begs the question

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Respondents suggest that "[f]ederal courts do not sit as peer review boards to conduct *sua sponte* review of congressional findings," Resp. 32, that contention fails to account for the huge body of case law wherein federal courts have routinely stricken allegedly benign racial classifications on the grounds that legislative findings were inadequate. In fact, just in the time elapsed since Adarand submitted its most recent brief to this Court, two more federal Circuit Courts of Appeals concurred that Congressional and other legislative findings must be scrutinized in close detail. *Rothe Dev. Corp. v. United States Department of Defense*, 2001 WL 936318, *16 (Fed. Cir. Aug. 20, 2001) (reversing summary judgment for the Department of Defense and ordering district court to undertake extensive, specific, fact finding regarding Congressional racial classification); *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 645-46 (7th Cir. July 6, 2001) (striking affirmative action program for lack of evidence of compelling interest) (Posner, J.). Further, though Respondents attempt to restrict this case to a challenge of "the statute and regulations on their face," Resp. 19, the argument requires little attention because challenging a regulation "on its face" is identical to challenging the underlying statute "as applied." In addition, Respondents' argument is incompatible with strict scrutiny, as demonstrated by their reliance on cases in which this Court did not apply strict scrutiny. Resp. 20. Although actual discrimination of the requisite severity and effect against a single individual might happenstantially justify application of the DBE presumptions to that one person, it is absurd to suggest that, without more, this mere possibility provides the necessary strong basis in evidence of a compelling interest and narrow tailoring necessary to support enactment of the racial classification in the first place. In other words, a statute is facially invalid if it is incapable of constitutional application, Brf. 42, but the converse is not necessarily true.

because the Fifth Amendment strictly limits the spending power. *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 US 264, 268 (1981). Second, unlike many members of Congress, Respondents do not assert that "diversity" could ever justify compulsory racial discrimination by government.[12] Resp. 24; *compare* Brf. 38-39 nn.27-33. Third, Respondents do not dispute that they bear the ultimate burden of proof, despite that several Circuits have departed from this Court's teachings in this regard.[13] Brf. 23. Fourth, Respondents concede that in order to meet their burden, they must adduce a "strong basis in evidence" of a compelling interest. Resp. 35. Fifth, they concede that TEA-21's direct-procurement DBE program is unconstitutional unless the necessary strong basis in evidence shows Congress enacted the program as a "last resort." Resp. 24. Sixth, by presenting disparity studies to this Court, Respondents seem to agree that evidence in the form of such studies is necessary. Brf. 29. Seventh, though Respondents note the panel's conclusion that Congress need not make findings specific to each group entitled to the presumptions, Respondents never argue that the panel was correct in this regard. Resp. 17. It was not. Brf. 49. In addition, though Respondents faintly contend that post-enactment evidence could suffice to justify the DBE program, Resp.

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[12] Further, whereas Respondents rely on "passive participation," Resp. 24, they present no evidence whatsoever that DOT has been sufficiently complicit in discrimination by others to satisfy that standard, *e.g.*, by knowingly funding projects wherein prime contractors engaged in racial discrimination. *County of Cook*, 256 F.3d at 645.

[13] Placing the ultimate burden of proof on Respondents in this case is consistent with the federal requirement that the prosecution bears the ultimate burden of proving in Fourth Amendment search and seizure cases that the government acted with a warrant, or in the absence of a warrant, that the search was constitutional. Wayne H. LaFave, *et al.*, *Criminal Procedure* § 10.3(b) (2nd Ed. 1999).

25, the law on this point is clear as well: post-enactment evidence is of no value in compelling interest analysis.[14] Brf. 35; *Rothe Dev. Corp. v. United States Department of Defense*, 2001 WL 936318, *13-14 (Fed. Cir. Aug. 20, 2001) (and cases marshaled there). Finally, it is now clear that "there is no difference in the evidentiary burden that must be faced during litigation (*i.e.*, a 'strong basis in evidence') and the evidence that a legislature must have before it when it enacts a racial classification." *Rothe*, 2001 WL 936318 at *13 (and cases marshaled there).

Given these concessions and operative law, at least three insurmountable obstacles prevent Respondents from carrying their burden. First, Respondents' reliance on material as much as thirty years old cannot possibly comport with the requirement for contemporaneous evidence of a compelling interest. Even if there had been a valid study to supported enactment of the DBE program in ISTEA (the predecessor highway funding bill to TEA-21), if the program accomplished even some of what Congress allegedly intended it to do, that study would no longer be accurate within a few years. Therefore, assuming such a study existed, it could not support re-enactment of the DBE program in TEA-21 unless and until that study was repeated with fresh data. No new or repeat study was ever done, however. Consequently, evidence not contemporaneous with and designed to support enactment of TEA-21 cannot constitute the requisite strong basis in evidence.[15]

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[14] In asserting that post-enactment evidence may be considered, Respondents rely on an inapposite case in which this Court "appl[ied] the standards for intermediate scrutiny" only. *Turner Broad. Sys., Inc. v. FCC*, 520 US 180, 189 (1997); Resp. 25.

[15] Because there is no evidence specific to enactment of TEA-21, Respondents found themselves forced to ascribe their compendium of items from ISTEA to both ISTEA and TEA-21. Resp. 196a-97a.

Second, though Respondents adduce seven construction industry disparity studies by name, submit several to this Court, and urge this Court to consider them, none of those studies assists in establishing a strong basis in evidence. The studies include: the Benchmark Study, a meta-study contained in the GAO report, a meta-study conducted by the Urban Institute, studies from the states of Colorado and Louisiana, and studies from the cities of Denver and Atlanta. As an initial matter, there is no evidence that in enacting TEA-21 Congress actually considered any of these studies. They are only mentioned in floor statements, which are insufficient to support a compelling interest.[16] Brf. 37-37 n.26. In addition, Respondents rely most heavily on the Benchmark Study and GAO Report, *e.g.*, Resp. 31, 37, but neither one existed when Congress passed TEA-21. 63 Fed. Reg. 35714 (June 30, 1998); Pub. L. 105-178, 112 Stat. 113 (June 9, 1998); Gov't Lodging 1847 (June 2001). Furthermore, the GAO Report decimates the notion that it, or any of the studies it analyzed, could form the basis of a compelling interest:

> the limited data used to calculate disparities, compounded by the methodological weaknesses, create uncertainties about the studies' findings. . . . While not all studies suffered from every problem, each suffered enough problems to make its findings questionable. We recognize

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[16] Respondents' comments regarding the utility of Congressional floor managers' statements refer to statutory construction only, and have no bearing on this case. Resp. 32 n.14 (and cases cited there). Further, many of Respondents' citations demonstrate the dangers of relying on floor statements, *e.g.* the allegation that "minorities own nine percent of construction firms but receive only four percent of construction receipts," Resp. 30-31 n.12, 27 n.7, misleadingly ignores that prime contractors by definition receive greater receipts than the subcontractors they hire, and that DBEs "are small businesses . . . more likely to compete for subcontracts . . . than prime contracts . . . . " GAO Report, Gov't Lodging 1869.

> there are difficulties inherent in conducting disparity studies and that such limitations are common to social science research; however, the studies we reviewed did not sufficiently address such problems or disclose their limitations.

GAO Report 29 (Gov't Lodging 1877).[17] One of the studies GAO so direly impugned was the 1998 study of the highway construction industry in Colorado that Respondents inexplicably submit as evidence in their favor. Petitioner's Lodging, Ex. O (a list of the 14 studies GAO analyzed, obtained by FOIA request; *see supra*, n.1). Respondents' attempted reliance on disparity studies from Denver and Atlanta is even more misplaced. Resp. 30, 31 n.12, 34. Both were thoroughly discredited by federal courts long ago.[18] Respondents' reliance on the Louisiana study is curious: they cite an anecdote about anti-Semitism, Resp. 30 (Gov't Lodging 197), but of course anecdotes about anti-Semitism cannot support a racial preference for people who are not Jewish. Perversely, moreover, SBA *denied* the presumptions of disadvantage to Hasidic Jews. 45 Fed. Reg. 42832 (April 9, 1980). Finally, not one of the studies Respondents rely on was ever submitted to any Court in this case for the necessary searching review – until now. The Denver study still has

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[17] *See also*, Government Accounting Office Report on Disadvantaged Business Enterprise Programs, 147 Cong. Rec. S7078-79 (June 28, 2001).

[18] Denver: "the methodology was not designed to answer the relevant questions, the collection of data was flawed, important variables were not accounted for in the analyses and the conclusions were based on unreasonable assumptions." *Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F.Supp.2d 1042, 1071 (D. Colo. 2000). Atlanta: "[study] contains no attempt to explain whether the disparity is due to discrimination or other neutral reasons, such as firm size and the ability of a firm to obtain financing and bonding." *Webster v. Fulton County*, 51 F.Supp.2d 1359, 1370 (N.D. Ga. 2000), *aff'd*, 218 F.2d 1276 (11th Cir. 2000).

not been produced.[19] Thus, Respondents have produced no evidence that this Court may rely on in sanctioning the use of discriminatory racial classifications that savage the dignity of thousands of individuals of all races.

Third, Respondents cannot be permitted to rely so heavily on allegations of discrimination in the banking industry. The suspiciously thin Grown & Bates study Respondents submit is devoted to capital access discrimination exclusively. Gov't Lodging 1-17. So are many of the hearings and great portions of the disparity studies Respondents cite. Resp. 28-29, 33, 196a-97a. Surely, though, the "last resort" solution to discrimination in banking must be directed at banks, not guardrail subcontractors. Further, Respondents provide zero evidence that Congress and the Executive have made adequate attempts to enforce anti-discrimination laws in banking. This Court found in *Croson* that the failure to *present evidence* that the government has properly enforced anti-discrimination laws deeply undercuts any effort to establish a compelling interest. 488 US 469, 502 n.3 (1989). Accordingly, in this case the "complete silence of the record concerning enforcement" of anti-discrimination laws in the banking, bonding, and surety industries precludes any credible contention that DBE programs in highway construction are a last resort solution to capital access discrimination.[20] *Id.*

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[19] Respondents' failure to submit the actual studies precluded Adarand from addressing them as specifically as the panel belatedly demanded. *See* Pet. App. 46-47 n.14; Resp. 33. Adarand cannot reasonably be expected to have rebutted every one of the tens of millions of dollars worth of such studies that have been performed since this Court's decision in *Croson*. *Associated General Contractors of America v. City of Columbus*, 936 F.Supp. 1363, 1431 (S.D. Ohio 1996), *vacated on jurisdictional grounds*, 172 F.3d 411 (6th Cir. 1999).

[20] GAO found DOT itself is guilty of slack enforcement and other failures to attempt race-neutral solutions. For example, DOT receives written complaints of discrimination but does not

Finally, Respondents again assert that a decline of DBE participation after DBE programs have ended somehow provides evidence of a compelling interest, but the claim is illogical and unsupported by credible evidence. Whereas Respondents contend that "DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended," Resp. 31, GAO investigated and determined "Michigan could not provide" the relevant data to support that assertion, and "the analysis showing the decline that is often cited . . . is no longer available." Gov't Lodging 1885. Consequently, GAO "c[ould] not verify the number cited during the debate." *Id.* Neither can Respondents or this Court. Similar problems afflicted other post-program decline analysis Respondents cite. *Id.* Post-program decline therefore cannot help establish a compelling interest.

III. The Record Contains No Evidence Of Narrow Tailoring.

Respondents admit, as they must, that Congress has the power to pass laws that take effect only in some states and only under limited circumstances. Resp. 38. This concession, coupled with the continuing, post-Benchmark Study, nationwide use of 8(a) set-asides and compulsory DBE subcontracting plans, precludes any credible assertion the direct-procurement DBE program is narrowly

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analyze the information to detect any patterns of discrimination that may still persist. Gov't Lodging 1881. In addition, though GAO found "USDOT officials . . . stated that they believe contract bundling is one of the largest barriers for DBEs in competing for transportation contracts," Gov't Lodging 1883, and a recent Executive Order commanded DOT to "submit to the SBA for review any contracts that are proposed to be bundled," EO 13170 § 7, 65 Fed. Reg. 60827. Respondents have submitted no evidence of any attempt to unbundle contracts prior to enactment of TEA-21.

tailored. Based on the Hispanic heritage of its owner, moreover, Gonzalez Construction remains entitled to race-based DOT contracting preferences in Colorado despite that the Colorado disparity study Respondents lodged found Hispanic-owned businesses are already used at 183% of their purported availability on federally funded projects in Colorado. Petitioner's Lodging, Ex. P; Gov't Lodging 678 (Ex. 6-12). To paraphrase Respondents' enchanting understatement, this situation "raises difficult questions" at best. Resp. 36.

Further, much of Respondents' narrow tailoring argument relies on goal setting and achievement regulations that govern state and local recipients of DOT financial assistance, but that do not govern DOT itself. Resp. 5-6, 39, 42-45; *see* Brf. 16 n.10. Since Respondents admit these regulations do not apply in this case, discussion of these regulations may be ignored.[21] Resp. 7. Unaffected by state and local regulations, moreover, the federal goal remains rigid and arbitrary. Recent Executive Order No. 13170 echoes the Small Business Act and demands that DOT "shall establish a goal of achieving a participation rate for [DBEs] of not less than 5 percent" in direct procurement. 65 Fed. Reg. at 60828. The Order leaves DOT no discretion. Further, Respondents have produced no evidence that any Secretary of Transportation in history has considered alteration of DOT's persistent 10% direct procurement goal. Thus, while the record in this case might leave some uncertainty as to whether the SBA 5% goal or DOT 10% goal predominates in DOT direct

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[21] In reality, moreover, many of the cited regulations do not advance narrow tailoring as a practical matter. The "good faith" standard for DBE hiring by prime contractors on state and local projects, *e.g.*, effectively precludes hiring of non-DBE subcontractors because prime contractors still must hire DBEs if their bids are "reasonably competitive." Ex. Q 905. Since "reasonably competitive" is not defined, the only practical way for non-DBE subcontractors to win is to bid so low that reasonable profit is impossible.

procurement, there is no question that the goal operates as a quota.[22]

Whatever the operative goal, moreover, Respondents' reliance on a putative "affidavit of disadvantage" mocks the requirement for individualized inquiry even while effectively admitting the need for victim-specificity. By signing the affidavit, an applicant asserts only that he is a member of a preferred racial group, that he has "acted as a member of that group," and that he has "experienced social disadvantage due the effects of discrimination." 66 Fed. Reg. 23208, 23227 (May 8, 2001). Reproduced as App. 1. There is no temporal limit. There is no severity requirement. In direct contravention of TEA-21, the affidavit does not even require the alleged discrimination or its effects to have occurred in America, let alone in the American construction industry. Brf. 8-9. Thus, a successful business owner who was called names by a stranger one day on a playground on another continent decades ago may sign this affidavit with impunity. The utter boundlessness of the affidavit completely precludes any prosecution for perjury, moreover, despite Respondents' contrary assertions. Resp. 39-40. There simply would be no way to establish the elements of that crime. Notarization of the affidavit does not help. At most, it shows only that the signature is authentic. As a result, the affidavit amounts to nothing more than the signatory's assertion of

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[22] Even if the regulations pertaining to formulation of state goals apply, they do not effectively contribute to narrow tailoring. Those regulations permit the use of Census data and Dun & Bradstreet data instead of any truly reliable indication of the number of "qualified," "willing and able" firms that exist in the region. 49 CFR § 26.45(c)(1). State recipients are permitted merely to "[d]ivide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs. . . . " *Id.* It does not take a statistician to realize this method takes no account whatsoever of firms' qualifications and current workload, contrary to this Court's holding in *Croson*.

his own, subjective, unsupported opinion that he has been victimized in some unspecified way. In Title VII statutory analysis, the closest available analog, such an affidavit constitutes evidence of nothing. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 US 574, 576 (1986); *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1408 and n.7 (10th Cir. 1997) ("subjective belief of discrimination is not sufficient"). The affidavit therefore does not advance narrow tailoring.

Finally, Respondents put great stock in the assertion that the race-based presumptions are rebuttable, Resp. 40, but that argument fails as a matter of historical record and as a matter of practicality. In passing the program, Congress unmistakably instructed that the section of the Small Business Act that mandates the presumptions "does *not* allow the awarding agency or the prime contractor to refute *any* presumption with respect to equating ethnic status with disadvantage." H. Rep. No. 95-949, at 11 (1978) (emphasis added). Thus, if materials from the 1970s may be considered as evidence in this case, as Respondents contend, then it is clear this program is not narrowly tailored. Further, current internal management documents from the Small Business Administration make clear that the presumption of social disadvantage is rebutted "only when there is a question of whether or not an applicant is in fact a bonafide member of the designated group," *not* when there is a question as to whether the applicant actually suffered discrimination of the requisite severity and effect. Supplemental Lodging of *Amicus Curiae* Center for Individual Rights 3 no.8. In addition, as a practical matter there is no conceivable way to refute the assertion that someone has "acted as a member" of a racial group, as the affidavit demands, without engaging in the same odious, illegitimate racial stereotyping that the DBE program is supposed to remedy. 66 Fed. Reg. 23227 (May 8, 2001). Nor is there any way DOT could develop tolerable guidelines for determining, for example, whether someone "acts like an Asian" generally, or "like a Tuvaluvan" in particular. It is

also impossible to assert that someone did not suffer sufficiently severe discrimination to entitle him to the presumption of social disadvantage when there are no severity requirements whatsoever. Nor does the DBE scheme contain any indication of any event or circumstance, such as election to the United States Senate or winning a Nobel Prize, that would result in lapse of "socially disadvantaged" status. In any event, compared to requiring that DOT *must* launch a challenge when it has reason to believe a DBE owner is not socially disadvantaged, Respondents' assertion that DOT "may" (or may not) launch such a challenge does not substantially advance narrow tailoring. Resp. 5. In effect, therefore, the presumption of social disadvantage is conclusive and permanent.

CONCLUSION

For the foregoing reasons, all manifestations of the racial classifications inherent in the DOT's direct-procurement DBE program should be found unconstitutional and enjoined.

Respectfully submitted,

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AFFIDAVIT OF SOCIAL AND ECONOMIC DISADVANTAGE

This form must be signed and notarized for each owner upon which disadvantaged status is relied.

SOCIAL DISADVANTAGE

I hereby certify under penalty of perjury that I am a member of one of the following groups:
❒ African American ❒ Hispanic ❒ Native American ❒ Caucasian ❒ Asian Pacific ❒ Asian Indian
❒ Other Ethnic Group (*explain*) _____

And that I have held myself out as a member of that group and have acted as a member of that group.

I further certify that I am an owner of the company seeking DBE certification and that I have experienced social disadvantage due to the effects of discrimination based upon my (check all that apply)
❒ race ❒ ethnicity ❒ gender ❒ other *(explain)*

Print Name: _____ Signature _____ Date _____

PERSONAL FINANCIAL STATEMENT

I hereby certify under penalty of perjury that my personal net worth does not exceed $750,000.

Print Name: _____ Signature _____ Date _____

This statement is supported by (check one)
❑ A signed, notarized statement of personal net worth, with appropriate supporting documentation.
❑ A signed, notarized statement from a certified public accountant (CPA) attesting that the he/she has examined my personal net worth and determined, consistent with the provisions of §26.67(a)(2) and generally accepted accounting standards, that my personal net worth does not exceed $750,000.

NOTARY CERTIFICATE

STATE OF _____
} SS:
COUNTY OF _____

Subscribed and sworn to before me this _____ day of _____, 20 _____.

Printed/typed name of Notary Public _____

Signature of Notary Public _____

County of residence _____ Date commission expires _____

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Supreme Court, U.S.
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No. 00-730

In The
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.
NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF GEOD CORPORATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND URGING REVERSAL

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45 pp

EDITOR'S NOTE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT

I. The Court of Appeals Improperly Used "Judicial Notice" in Granting Summary Judgment to Defendants Based Solely On A Document Created By a Litigant During the Course of Litigation 4

II. Appendix A Does Not Constitute A "Strong Basis In Evidence" That There Was Racial Discrimination In Highway Construction Justifying A Race-Conscious Remedy. 12

A. The Respondents Did Not Show That Discrimination Caused Any Observed Disparity In Highway Construction 16

B. The Appendix Fails to Demonstrate That Government Participated In The Discriminatory Pattern of Exclusion 22

CONCLUSION 25

APPENDIX A1

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BRIEF AMICUS CURIAE OF GEOD CORPORATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND URGING REVERSAL

INTEREST OF *AMICI CURIAE*

GEOD Corporation is a closely held corporation, with its headquarters in New Jersey. Its principals are white males. GEOD has acted as a "sub-consultant," providing aerial photography, topographic mapping, surveying, and photogrammetric services to prime consultants and subconsultants on numerous large scale road, bridge, tunnel, airport and other infrastructure construction projects for the State of New Jersey, the New Jersey Department of Transportation, other New Jersey agencies, and agencies of other states and municipalities, as well as for the private sector. GEOD is currently suing the State of New Jersey, it officials, and the New Jersey Department of Transportation, claiming that New Jersey's public contracting affirmative action programs have unlawfully deprived GEOD of opportunities to work on state and federally-funded construction projects. Atlantic Legal Foundation (ALF) is a non-profit public interest law firm, whose mandate is to advocate principles of limited and responsible government and individual rights. It is representing GEOD in its lawsuit against New Jersey; in the past it has represented other firms suing other government instrumentalities in cases involving unlawful race-conscious "affirmative action programs. The staff of ALF is familiar with many of the "disparity studies" at issue in this case.[1]

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[1] Counsel for the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.
Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

Amici believe that the Court of Appeals for the Tenth Circuit improperly applied judicial notice in relying on a document prepared by one of the litigants as evidfence for the central issue in this case. *Amici* also believe that the document itself, if carefully examined, does not constitute the requisite "strong basis in evidence" required to support a government program that gives preferences to certain groups based on race, ethnicity and gender, and invidiously discriminates against others.

SUMMARY OF ARGUMENT

The Court of Appeals' sole basis for finding a compelling government interest in enacting the Department of Transportation's DBE program was "judicial notice" of Appendix A -- "The Compelling Interest,", a document prepared by one of the litigants. Appendix A consists entirely of hearsay, double hearsay and even more remote hearsay. The Court of Appeals did not examine the underlying documents on which Appendix A was purportedly based.

Appendix A is an insufficient basis in evidence on which to grant summary judgment in favor of Respondents.

The Court of Appeals' attempt to make Appendix A "evidence" by taking judicial notice of its contents should be reversed because the truth of the matters in Appendix A is the at the very heart of the issue in controversy and Appendix A is not a proper subject of judicial notice.

Even if Appendix A were properly susceptible of judicial notice, it does not support a finding that there is the "strong basis in evidence" required to uphold a racially discriminatory government program because its statistical and anecdotal bases are flawed. The Court of Appeals failed to analyze whether there was a valid basis for finding a statistical disparity, and whether a pattern of discrimination caused any disparity. The Court of Appeals also failed to inquire whether the government participated in discrimination, and Appendix A does not establish such government complicity.

ARGUMENT

I. The Court of Appeals Improperly Used "Judicial Notice" in Granting Summary Judgment to Defendants Based Solely On A Document Created By a Litigant During the Course of Litigation.

The Tenth Circuit Panel correctly recognized that, under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486-92, 500 (1989), the critical inquiry for strict scrutiny purposes is whether there is a "strong basis in evidence" for the legislative conclusion that "remedial action was necessary," *see Adarand Constructors v. Slater*, 228 F.3d 1147, 1167 (10th Cir. 2000). However, rather than analyzing the evidence, as Justice O'Connor did in *Croson*, the Panel found the legislative conclusion by taking judicial notice of the ultimate fact raised by the summary judgment motions. 228 F.3d 1147 at 1168, n. 12.

The Panel took "judicial notice of the content of hearings and testimony before the congressional committees and

subcommittees cited by the government" and deemed "the disparity studies were . . . introduced into evidence . . . via [Appendix A]."[2] 228 F.3d 1147 at 1168, Pet. App. 33-34 & n.12, 47 n.14, 54. This single document of approximately 15 pages[3], was prepared, while this case was in litigation, by a

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[2] The Panel relied on Appendix A itself, not the studies, hearings and other materials Appendix A purports to summarize. This is obvious from a perusal of the Panel's opinion and its constant reference to "statistical and anecdotal evidence" as reported in "The Compelling Interest."

One example of the Panel's failure to search behind the self-serving Appendix is the Panel's reliance on an early draft of a study by the Urban Institute,which was completed in December 1997, more than 18 months after Appendix A was published. 61 Fed. Reg. 26061 n.128. The final Urban Institute study (Enchautegui, Maria E., *et al.*, *Do Minority Owned Businesses Get a Fair Share of Government Contracts?* (available online at www.urban.org/authors/enchautegui.html). The final Urban Institute study, issued more than two years before the Court of Appeal's opinion decision was handed down, concluded that there was no statistically significant underutilization of minority construction subcontractors. *Id.* at 15 and n.6. The final Urban Institute study also states that whatever disparities it did detect "do not necessarily translate into proof of discrimination on the part of state and local governments." *Id.* at xiv. This is itself a reason the Panel's reliance on the Appendix is incorrect: When the author of a study asserts that the data is not statistically significant, the study does not support the conclusion that this data is statistically significant. *See General Electric Co. v. Joiner*, 522 U.S. 136, 144 (1997).

[3] The Appendix is not particularly long (about 15 pages of three columns each), but in its footnotes it refers to an enormous amount and variety of hearings, reports, books and articles going back to 1964. These documents would certainly fill an entire bookcase, and it is doubtful that any single human being has read all of them. Indeed, that appears to be part of the Government's strategy: to overwhelm the reader with citation so much material that it convinces by its mere volume. Indeed, it is often difficult to trace the sources cited in the Appendix. For example, most references to Congressional documents do not contain page cites, as though the whole of a report or hearing was relevant to the specific assertion in the Appendix. So far, with the Panel, that tactic has been successful.

then unidentified employee of the Department of Justice.[4] This document, the "Appendix – The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey" (61 Fed.Reg. 26050 (1996))[5] early on states the conclusion of which the Panel took judicial notice: "In short, there is today a compelling interest to take remedial action in federal procurement." *Id.* (footnote omitted)[6] The Panel took

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[4] It has been subsequently learned in the course of discovery in other cases challenging the Department of Transportation's affirmative action programs, *Gross Seed Company v. Nebraska Department of Roads*, 4:00CV3073 (D.Neb.) and *Sherbrooke Turf v. Minnesota Department of Transportation*, 00-CV-1026 (JMR/RLE) (D. Minn.) that the document was prepared in less than two weeks by one Sean Flynn, a paralegal with four years experience, working with little supervision, and no review of the underlying documents to check Mr. Flynn's citations for accuracy, by attorneys at the Justice Department. The DoJ attorney listed in the Federal Register as the "contact person," Mark Gross, testified that the Appendix "was not intended to be comprehensive." (Deposition of Mark Gross, January 18, 2001, Tr. at 52, line 21 - 61, line 12, annexed to this brief as Appendix A). *See generally*, Roger Clegg and John Sullivan, "No Compelling Interest," in National Review Online, May 25, 2001, available online at www.nationalreview.com/contributors/clegg052501.shtml.

[5] The formal title is "Proposed Reforms to Affirmative Action In Federal Procurement, Appendix A, 'The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey.'" 61 Fed. Reg. 26041, 26050 (May 23, 1996).

[6] It appears that the Department of Justice no longer agrees with this sweeping conclusion. In a deposition given in two cases now pending in which the DOT program is being challenged, *Gross Seed Company v. Nebraska Department of Roads*, 4:00CV3073 (D.Neb.) and *Sherbrooke Turf v. Minnesota Department of Transportation*, 00-CV-1026 (JMR/RLE) (D. Minn.), the attorney listed in the Federal Register as the "contact person," Mark Gross, testified that the "we were presuming that Congress had compelling interest for enacting the [Federal Procurement] statute. What Sean [Flynn] did is compile a lot of reports and data which went to the various areas which the courts and Congress have said showed there was a discriminatory history that would effect DBE's ability t participate in federal

judicial notice of single and double (and likely even more remote[7]) hearsay, compiled, crafted and proffered by a litigant and its attorneys or employees. However, Appendix A is essentially a legal brief arguing obsolete theories, rather than a reflection of any new research or analysis in the post-*Croson* and post-*Adarand* era. Although the purported purpose of the Appendix is to establish a compelling interest for racial and ethnic preferences, there is an extraordinary lack of a discussion of judicial standards about the necessary factual predicate. Neither *Croson's* nor *Adarand's* statements about the evidence necessary to establish compelling are discussed in any detail. Many of the lower court cases about compelling interest and narrow tailoring are not mentioned at all. The many decisions in which race and ethnic conscious procurement

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contracting. So he [Flynn] was charged with finding whatever reports are out there that would support the compelling interest." (Deposition of Mark Gross, January 18, 2001, Tr. at 57, line 20 - 59, line 2, annexed to this brief as Appendix A). *See generally*, Roger Clegg and John Sullivan, "No Compelling Interest," in National Review Online, May 25, 2001, available online at www.nationalreview.com/contributors/clegg052501.shtml.

[7] The "disparity studies" which the Appendix cites typically rely on unsworn and unexamined "anecdotal" evidence." This often includes anonymous responses to survey instruments which are never verified by the authors of the study, and which often reflect subjective perceptions of discrimination by the respondents to the survey (who are often not a representative sample); there is usually no attempt by the studies' authors to question the survey respondent as to the basis for the perception of discriminatory treatment, and almost never any attempt to question the alleged perpetrator of discrimination about its version of the incident. Likewise, much of the "testimony" that forms another component of anecdotal "evidence" is usually not subject to cross-examination or rebuttal; and this testimony is itself often hearsay or double hearsay.

programs have been struck down as unconstitutional are neither cited, distinguished, nor even discussed.

Pursuant to Federal Rule of Civil Procedure Rule 56(c) and (e), on a motion for summary judgment, evidence in support of or in opposition to the motion must certain vital criteria: First, the evidence must be in the form of admissions, depositions, answers to interrogatories, affidavits, or other sworn testimony. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); second, any such sworn testimony "shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence . . . ." Fed. R. Civ. P. 56(e). Appendix A satisfies neither criterion. It was not submitted with an affidavit by anyone. It is not answers to interrogatories or deposition testimony. It was prepared by a party's attorneys (or the attorneys' employee) for the purposes of this very case. It was obviously not based on their personal knowledge. It consists entirely of hearsay within hearsay, all of which the Panel used for the truth of the matters asserted, and which therefore would be inadmissible.

We submit that the Panel's use of judicial notice under these circumstances disregarded not only the substantive rule of *Croson* but also well established rules of evidence. If this Court countenances such practice, the Government, anytime it is a litigant, can create evidence that will "prove" the essential elements of its case. That would be a clear miscarriage of justice.

Both at common law and under Rule 201 of the Federal Rules of Evidence, judicial notice, properly applied, is a procedural device for eliminating the need for formal proof. *See, e.g., York v. American Telephone & Telegraph Co.*, 95

F.3d. 948, 958 (10th Cir. 1996); Weinsteins's *Federal Evidence* §§201.02 [1], [2] (2nd ed.); *Black's Law Dictionary* (7th ed.) ("A court's acceptance for purposes of convenience and without requiring a party's proof, of a well-know and indisputable fact.")

One noted commentator provides a succinct summary of the several applications of judicial notice:

> The scope of facts that may be noticed includes:
>
> (1) Matters which are actually so notorious to all that the production of evidence would be unnecessary;
>
> (2) Matters which the judicial function supposes the judge to be acquainted with, in theory at least;
>
> (3) Sundry matters not included under either of these heads; they are subject for the most part to the consideration that though they are neither actually notorious nor bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary."

9 Wigmore, *Evidence* § 2571 (Chadbourn rev. 1981).

These parameters are codified in the Rule 201 of the Federal Rules of Evidence which, by its terms, operates only as to adjudicative facts. Fed R. Evid. 201(a), Advisory Committee Notes; *Siderius, Inc. v. M.V. Amilla*, 880 F.2d 662, 666 (2d Cir. 1989).

Adjudicative facts are "the ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the jury unless clearly indisputable." 21 C. Wright & K. Graham, *Federal Practice and Procedure* §5103 (2001 supp.), cited in *Snell v. Suffolk Co.*, 782 F.2d 1094, 1105 (2nd Cir. 1986). Another description of adjudicative facts focuses on those facts which directly relate to the litigants: "when a court . . . finds facts concerning the immediate parties – who did what, where, when, how and with what motive and intent – the court. . . is performing an adjudicative function, and the facts are conveniently called adjudicative facts . . . ." Fed. Rule Evid. 201(a), Advisory Committee notes, citing 2 Davis, *Administrative Law* §353.

In taking judicial notice of adjudicative facts to establish the Respondents' compelling interest in remedying racial discrimination, the Court of Appeals panel disregarded straightforward language of Rule 201(b). Rule 201(b) permits judicial notice *only* of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neither "The Compelling Interest" nor the sources it catalogs meet the criteria of Rule 201(b).

First, the issue of Respondents' compelling interest here was the central fact in dispute. Judicial notice of the ultimate fact to be determined in the litigation, transforming the disputed into the conclusive by joint operation of Rule 201 (b) and (g) in a civil matter, is unprecedented.

Second, the Panel's resort to judicial notice cannot be saved because the "facts" taken out of contention were contained in statements or in documents which found their way into the legislative record. The Panel conceded as much: "We cannot merely recite statements made by members of Congress alleging a finding of discriminating effects . . . ." 228 F.3d. at 1167. The mere fact that a witness testifies in a congressional hearing or prepares a report that is filed with a government agency does not negate or dilute the purpose of judicial notice or the requirements of Rule 201. *See, e.g., United States v. Bonds*, 12 F.3d 540, 553 (6th Cir. 1993); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3rd Cir.), *cert. denied*, 510 U.S. 868 (1993); *Melong v. Micronesian Claims Commission*, 643 F.2d 10, 12 n.5 (D.C. Cir 1980); *Southern Louisiana Area Rate Cases v. Federal Power Commission*, 428 F.2d 407, 438 n. 98 (5th Cir. (1970).

The Panel evaded the "searching judicial inquiry into the justification for such race-based measures" required by *Croson* (488 U.S. at 493) by its misuse of judicial notice. If the Panel's misuse of judicial notice were countenanced by this Court, the Government could, in almost any civil case to which it was a party, create "facts" that would determine the outcome. This would be a serious threat to the independent adjudicatory role of the judicial branch.

II. Appendix A Does Not Constitute A "Strong Basis In Evidence" That There Was Racial Discrimination In Highway Construction Justifying A Race-Conscious Remedy.

It is settled law that the use of a racial classification by a governmental actor must be supported by a "strong basis in evidence" of a compelling governmental interest in remedying particularized discrimination in which that government somehow participated. *Croson*, 488 U.S. at 500. "[T]he true test of an affirmative action program is . . . the adequacy of the evidence of discrimination offered to show that interest." *Engineering Contractors of S. Fla.. v. Metropolitan Dade County,* 122 F.3rd 895, 906 (11th Cir. 1997)[8].

In this case, relying exclusively on the content of Appendix A, the Panel concluded that the following phenomena

[8] In *Engineering Contractors*, the 11th Circuit continued:

> The existence of each [of] the programs, including all of its component parts, must withstand the appropriate level of constitutional scrutiny if that program is to be upheld. Either a *program* is grounded on a proper evidentiary factual predicate or it is not. If it is, then that program sails on to the next stage of the analysis, where each component contract measure is tested against the "narrow tailoring" and "substantial relationship" requirements. On the other hand, if a program is not grounded on a proper evidentiary basis, then all of the contract measures go down with the ship, irrespective of any narrow tailoring or substantial relationship analysis.

Id.

constitute the required strong basis in evidence:[9]

- Ownership of companies is often inherited by family members. 228 F.3d 1147, 1168.
- Individuals with no experience have difficulty joining a union in order to gain the experience needed to compete with established non-minority companies. 228 F.3d 1147, 1169.
- Firms or individuals who have no credit history or collateral have difficulty of obtaining access to capital. 228 F.3d 1147, 1169.
- Prime contractors prefer to work with subcontractors they already know and trust because they previously worked with those subcontractors. 228 F.3d 1147, 1170.
- "Bid shopping," a practice by which prime contractors allow trusted subcontractors to see and beat any lower

[9] The district court in this case found that the problems Congress was trying to remedy were:

> [D]eficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with the bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

965 F.Supp. at 1576.

bid from new, untested firms trying to replace the established subcontractors. 228 F.3d 1147, 1171.

- The inability of new market entrants to receive special pricing arrangements from suppliers with whom they have not previously dealt. 228 F.3d 1147, 1171.
- The inability of new enterprises to obtain bonding because they lack experience. 228 F.3d 1147, 1171-72.

However, these examples may constitute nothing more than normal commercial or social practices based on rational business or economic judgments; none are evidence of racial, ethnic or gender discrimination, let alone discrimination in which any governmental unit is implicated.[10]

If the purpose of the Appendix were only to demonstrate that there has been racial and ethnic discrimination in American society and the economy, this potpourri of documents would be sufficient, even redundant, because any basic knowledge of American history demonstrates historical "societal discrimination."[11] The necessary empirical support for the

---

[10] These phenomena constitute nothing more than "societal discrimination" which is an inadequate basis for race-conscious classifications, and not the type of identified discrimination that can support and define the scope of race-based relief. *See Croson* at 497.

[11] As this Court stated in *Croson*, 488 U.S. at 496-497 referring to *Bakke* "... [T]he history of discrimination in society at large [cannot] justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."

range of racial and ethnic preferences in federal procurement programs requires much more specificity and analytic rigor. This the Appendix, and the Panel's findings, lacks.

Problems of working capital, bonding, track record, and understanding the complexities of the procurement process affect many small and new firms. Whether these are currently distinctive problems for minority firms has not been subject to serious evaluation. If there are current examples of preselection or other types of discretion exercised by government procurement officers that exhibit bias against minority firms because of the race, ethnicity or gender of their owners, they have not been identified in the Appendix or by the Panel. If such practices exist, the first responsibility of DOT and state and local highway or other contracting agencies would be to correct them and, if they were purposeful, to punish those involved.

A legally adequate "strong basis in evidence" must consist of logically and mathematically sound analysis which demonstrates that there is a statistically significant disparity in the utilization of minority contractors or subcontractors in highway construction, traces that disparity to deliberate discrimination, and demonstrates at that government was at least a "passive participant" in that discrimination. *See Croson* at 492.[12]

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[12] Because DOT's program is national in scope, DOT needed statistical evidence that racial discrimination caused nationwide underutilization of minority contractors. The only nation-wide study ever published shows minority highway contractors underutilized in only eight states, of which Colorado was not one. *See United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 1759 (2000) in which this Court made it clear that

Neither the Appendix nor the Panel have demonstrated the requisite "strong basis in evidence."

A. The Respondents Did Not Show That Discrimination Caused Any Observed Disparity In Highway Construction.

Croson teaches that a "gross statistical disparity," if properly calculated, can raise an inference of racial discrimination, but that statistical disparity alone, is not a sufficient strong basis in evidence. 488 U.S. at 501. As the Panel recognized, anecdotal evidence of discrimination may be considered only after a the necessary statistical showing.[13] In order to conclude that there is a compelling interest, a court must have valid statistical evidence of "patterns of deliberate

---

"congruence" requires a match between the geographic area in which the race-based solution is applied and the geographic area in which government participation in discrimination is found.. When "Congress' findings indicate that the problem of discrimination . . . does not exist in all States," the solution cannot apply to all states, either. *Id.* Congress instead has the power to direct a remedy for discrimination "only [in] those States in which Congress found that there had been discrimination." *Id.*; *see also Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

[13] The Panel also recognized "Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not." 228 F.3d 1147 at 1166. As the Eleventh Circuit noted in *Engineering Contractors Association of South Florida v. Metropolitan Dade County, supra*, "Several circuits . . . have discussed the value and significance of anecdotal evidence in evaluating whether the government established a sufficient factual predicate to justify a race conscious or gender -conscious affirmative action program. We have found that kind of evidence to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence."

exclusion." *Croson*, 488 U.S. 509. The statistical evidence must meet at least four criteria.

Statistical evidence must be derived from the proper sample pool. That pool consists of those contractors who have the necessary expertise and experience to perform the work in question and who meet any legitimate qualifications, such as bonding requirements and capitalization, and who are not otherwise engaged at the time. *Croson*, at 502, 509. This Court called such contractors "qualified," "willing and able." *Croson* at 509. In the absence of statistical evidence derived from the proper pool, this Court found, any finding of racial animus would rest on only "the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population." *Croson* at 507. In this case, the Panel did not even inquire whether the statistics it relied on from Appendix A (which in turn were derived from untested and unexamined variety of "disparity studies") were derived from the proper pool of qualified, willing and able contractors. The General Accounting Office, in its Report to Congressional Committees required by TEA-21[14], "Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact," GAO-01-586 (June 2001) (hereafter the "GAO Report"), commented that

> Taken as a whole, these [disparity] studies suggest that disparities exist; however, we found significant weaknesses in the disparity studies we reviewed. For example, the studies consistently overstated the

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[14] Pub. L. 105-178 § 1101(b)(6); 112 Stat. 107, 114-15 (1998).

> number of qualified, willing and able firms or understated firms' utilization in transportation contracts. The weaknesses we have identified create uncertainties about the studies' findings . . . .

GAO Report at 6.

Disparity studies conducted for state and local governments usually rely on census data for calculating the number of "available" minority or woman-owned businesses. These census-based headcounts, however, provide no information about the qualification, ability, or willingness of the minority or woman-owned firms to perform work on government contracts in general or the particular public works projects "on offer." Other sources of "headcounts" of minority and woman-owned firms have similar or other serious problems. *See* GAO Report at 30-31.

Statistical evidence must also contain detailed explanation of the methods by which it was derived. Numerous "disparity studies" manipulate the census or other data in ways that are far from "transparent," and often not consistent with the realities of the particular industry segment involved, with the apparent goal of inflating the "availability" of minority or woman-owned firms, As the Seventh Circuit observed, "an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (1989). As this Court has said "[N]othing in . . . the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 140 (1997). The

Panel merely parroted the conclusions of the Appendix, without inquiring into its methods or the methodology of the underlying studies cited in the Appendix.

Statistical evidence must also utilize proper analytical tools to account for all the major variables, so that deliberate discrimination, if actually involved, may be identified as the cause of any calculated disparity. This Court has held that "[t]o draw an inference of discrimination from statistical disparities, while all 'measurable variables' need not be accounted for, all 'major variables,' must be controlled and accounted for." and that an analysis that does not control for at least major variables may be inadmissible. *Bazemore v. Friday*, 478 U.S. 385 at 400 and n.10 (1986). "[I]n order for statistical evidence to create an inference of discrimination, the statistics must show a significant disparity and eliminate nondiscriminatory explanations for the disparity . . . . statistical evidence *must* focus on *eliminating nondiscriminatory explanations* for disparate treatment between *comparable* individuals." *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (italics in original); *accord*, *Koger v. Reno*, 98 F.3d 631, 637 (D.C. Cir. 1996). "*Croson* . . . reaffirmed the Court's longstanding teaching that we must staunchly resist attempts to substitute speculation and correlation for evidence of causation." *Wessmann v. Gittens*, 160 F.3d 790, 804 (1st Cir. 1998); *accord Assoc'd Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000); *Walker v. City of Mesquite*, 169 F.3d 973, 985 n.33 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 969 (2000). The Panel's most glaring failure in this case was not to make any attempt whatsoever to investigate whether the

statistical data in the Appendix was the product of proper analyses to account for causes other than discrimination and deliberate exclusion. The Panel made no effort to ensure that the Appendix and the underlying studies considered relevant non-discriminatory factors.

The statistics must be collected separately for prime contracts and subcontracts. Unless subcontracting statistics are collected and analyzed separately it is impossible to discern whether there was in fact underutilization or whether the government passively participated in discrimination, because minority representation in subcontracts could make up for any observed disparity in prime contracts. In this case, the Panel not inquire, and Appendix A does indicate, whether subcontractor statistics were collected separately from prime contractor statistics. As the GAO Report noted:

> [S]everal studies we reviewed did not include any analyses of subcontracting and therefore may understate the utilization of [MBE/WBE] firms. Because MBE/WBEs are more likely to be awarded subcontracts than prime contracts, MBE/WBEs in particular may appear underutilized when the focus remains on prime contract data. Furthermore, although some studies did include calculations based on the number of contracts, all but two based their determination of disparities on only the dollar amounts of contracts. Because MBE/WBEs tend to be smaller than non-MBE/WBEs, they are often unable to perform larger contracts . . . . A more complete indicator of utilization would consider both the dollar amount and the number of contracts awarded or to control for differences in contract dollar amounts.

GAO Report at 32. *See also Engineering Contractors of S. Fla.. v. Metropolitan Dade County,* 122 F.3rd 895 (11th Cir. 1997).

The panel's failure to investigate whether Appendix A met these four criteria is, we submit, both apparent and fatal.[15]

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[15] Respondents and the Panel rely on discredited disparity studies. One example the Brimmer & Marshall study of disparities in Atlanta. Pet. App. 43. The Panel characterized that study as "particularly striking" evidence of deliberate discrimination, apparently ignorant of the fact that the study had been thoroughly discredited. As the court in *Webster* v. *Fulton County*, 51 F.Supp.2d 1359, 1368-70 (N.D. Ga. 2000), *aff'd* 218 F,2d 1276 (11th Cir. 2000) noted, the "study proceeds on the premise that a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences . . . in whatever area is involved." The study contained "no statistical analysis of other factors that may affect minority business enterprise availability and utilization." *Id.* The Eleventh Circuit affirmed the district court's holding that "the Brimmer-Marshall Study fails to provide a strong basis in evidence of discrimination against [D]BEs to justify [a] racial and ethnic preference program." 218 F.3d at 1267.

A number of other disparity studies on which the Appendix relies (because they were surveyed in the Urban Institute report - an prime example of double or triple or even more remote hearsay) have been found invalid as a predicate for local or state race-conscious remedies and have been heavily criticized by the courts that have reviewed them. For example, three months before the Urban Institute's report was issued, a federal district court in Columbus, Ohio overturned a proposed MWBE ordinance, finding that the disparity study was not only flawed conceptually, but was an example of research aimed at proving a particular result the City desired in commissioning the study. *(AGC v. Columbus,* 936 F.Supp. 1363, 1431 (S.D. Ohio 1996)). Nevertheless, the Urban Institute's report, and by extension the Appendix and the Panel, relied on the Columbus study, as well as 14 other studies completed by the same disparity study contractor, BBC, and which used essentially the same flawed methodology. A month before the Urban Institute report was released, a federal court in Miami struck down a Dade County MWBE program and criticized the disparity study produced by MRD Consulting, which is also relied on in the Urban Institute report. The Court said:

B. The Appendix Fails to Demonstrate That Government Participated In The Discriminatory Pattern of Exclusion.

In order to conclude that there is strong evidence of a compelling interest, a court must find evidence that the

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Plaintiffs have produced both evidence of race-neutral explanations for the disparities reflected in defendants' statistical analyses and evidence of flaws in the data and methodology that underlie defendant's statistics and make the numerical disparities neither significant nor actionable.

(Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 943 F.Supp. 1546, 1584 (S.D. Fla. 1996), *aff'd* 122 F.3rd 895 (11th Cir. 1997). Many other disparity studies are currently the focus of litigation.

For discussions of post-Croson disparity studies *see* Mitchell Rice, Government Set-Asides, Minority Business Programs and the Court, *Public Administration Review,* March/April, 1991, 114-122; Patrick D. Halligan, "Minority Business Preferences and Ad Hoc Hypotheses: A Comment on *Coral Construction V. King County."* 10 *Construction Law* 26 (November 1990); John Lunn and Huey L. Perry, "Justifying Affirmative Action: Highway Construction in Louisiana," 46 *Industrial and Labor Relations Review,* 464-479 (April 1993); George R. LaNoue and John Sullivan. "But for Discrimination How Many Minority Businesses Would There Be?" 24 *Columbia Human Rights Law Review* (Winter 1992); George R. LaNoue, "Local Officials Guide to Minority Business Programs and Disparity Studies: Responding to The Supreme Court's Mandate in *City of Richmond v. Croson,"* published by the National League of Cities (1st ed. 1991, 2nd ed. 1994) and George R. LaNoue, "Standards for the Second Generation of *Croson* Inspired Disparity Studies," 26 *The Urban Lawyer* 485 (Summer 1994). Neither the Urban Institute's report's nor the Appendix cite any of these works, which critique the methodology of almost all of the disparity studies so far completed, and the Panel seems to have been blithely ignorant of them.

government participated, actively, or at least passively, in the any deliberate patterns of racial exclusion it finds. *Croson*, 488 U.S. at 492. The Appendix does not provide any evidence that DOT had "essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the . . . construction industry.

Although the Panel stated, for example, that "subcontractors' unions place before minority firms a plethora of barriers to membership," (for which it relied on testimony before a Congressional Committee by civil rights activists and the Appendix[16], which refers to that problem existing in "several cities and states" (but not nationwide)) 228 F.3d 1147 at 1168, Pet App. 35, it failed to indicate how government was involved with that discrimination. Indeed, the Panel seems to

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[16] While the Appendix makes reference to 29 Congressional hearings held between 1980 and 1995, and occasionally quotes testimony at those hearings, the Appendix makes no distinction between findings that represent a Congressional consensus, the views of a single committee or the partisan majority on a particular committee or subcommittee, the views of a single Congressman representing constituents who are not objective or disinterested, or the views of advocacy organizations and individuals. No attempt was made, either by the author of the Appendix or the Panel, to verify the accuracy of the statement when made. Nor does the Appendix or the Panel distinguish between statements that may have been accurate 15 years ago, but are no longer correct.

Uncritical deference to Congressional statements, apparently a pillar of the reasoning underlying the Appendix, is not consistent with the skepticism required by *Adarand,* where constitutional rights are concerned. Moreover, the Appendix seems to rely on cases, such as *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which are no longer good law. This Court said in *Adarand* " . . . to the extent (if any) that *Fullilove* held federal racial classifications to be subjected to a less rigorous standard, it is no longer controlling." *Adarand III*, 515 U.S. 200, 235.

have ignored efforts by the federal government, through legislation, regulations, executive orders, litigation and other enforcement action, to open union apprenticeship programs to participation by minorities. The Panel also ignored this Court's statement in Croson that "the exclusion of blacks from skilled construction trade unions and training programs . . . . [which] past discrimination has prevented them 'from following the traditional path from laborer to entrepreneur' . . . .that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts. . . ." *Croson* at 498-499.

Instead, the Panel relies on the circular reasoning that because the federal government funds the vast majority of highway projects, and that the bulk of the contract dollars were paid to non-minority firms, this "is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid." 228 F.3d 1147 at 1182. By that reasoning, all government activities involving interaction with the public could be deemed "participation" in a pattern of discriminatory exclusion.

CONCLUSION

Amici respectfully submit that the Appendix utterly fails to provide the required "strong basis in evidence" and that the Panel's reliance on the Appendix was wrong as a matter of evidentiary principles and as a matter of allocation of the burden of persuasion.

The judgment of the Court of Appeals for the Tenth Circuit should be reversed.

June 11, 2001

Respectfully submitted,

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APPENDIX

PAGE 1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

SHERBROOKE TURF, INC.,

Plaintiff,

- vs -

MINNESOTA DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

Court File No.
00-CV-1026 JMR/RLE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GROSS SEED COMPANY,

Plaintiff,

- vs -

NEBRASKA DEPARTMENT OF ROADS, et al.,

Defendants.

Court File No.
4:00CV3073

Washington, D.C.
January 18, 2001

Deposition of:
MARK GROSS

PAGE 52

Exhibit – excuse me, there is a mark US1-000194. This document was produced in discovery I think in this case.

MS. BURROWS: Only the first page appears to have –

MR. OLSON: Right.

MR. ADELSTEIN: I'm not certain which case this case refers to.

MR. OLSON: Yeah, by way of the marking it was produced by you folks, and I am just trying to figure out who authored it.

MS. BURROWS: I don't know that this is produced in Gross Seed. Let's just take a minute. We want to look at this.

MR. OLSON: Why don't we go off the record.

(Whereupon there was a brief discussion off the record)

MS. BURROWS: I think that we can go back on the record in this matter.

BY MR. OLSON:

Q Did you sign off on Appendix A? Were you the actual signatory to Appendix A?

PAGE 53

A No.
Q As part of your work after – was it Sean Flynn, was that his name?
A Yes, F-L-Y-N-N.
Q And his first name is spelled?
A Sean, S-E-A-N.
Q Now, was Sean a permanent employee or was he a summer intern?
A No, he was permanent. I believe he was a paralegal, which was his official title, but I'm not sure.
Q Do you recall how long he had worked there at the time that he performed this work?
A I think he had worked there about four years in the Department. I believe it was about four years.
Q In the capacity of a paralegal?
A Yeah.
Q Do you know if he was formally trained as a paralegal?
A I don't know.
Q Do you know if he was trained as a social scientist?

PAGE 54

A I don't know.
Q Do you know if anyone within the Department at the time the post-Adarand analysis was done whether or not anyone involved had a social science degree?
A I don't know.
Q Let me get back to what precipitated this. My esteemed colleague asked the question even clearer. Does Justice have a person trained in the social sciences who works on the issues of identifying discrimination or the validity of disparity studies?
A I don't know.
Q You are not aware of anyone?
A No.
Q You had indicated earlier that after Sean completed his analysis he provided a draft for your review; is that correct?
A Yes.
Q And that draft was provided to you and as I recall at least one other individual; is that correct?
A Yes.
Q And who were the other people to whom a draft was provided?

A As I recall it would have been Mike Small, Michael Small, Fran Allegra probably got a copy, and other than that I don't know who else got one.

Q And the purpose of a draft being provided to each of you was what?

A Editorial, clarity.

Q None of you substantively reviewed his analysis to determine whether or not you agreed with his conclusions?

A I'm not sure I know how to answer that. I think if there were sentences that we thought didn't quite follow from, you know, what he had said, we might change the sentences, but insofar as reviewing the underlying documents to determine if they said what he said they said, no, I didn't do any of that sort of review.

Q Did anybody do that?

A I don't know.

Q Did anybody do any sort of review as to whether or not the language that Sean said was contained in those documents, whether or not that language qualified in your opinion, or Fran's opinion,

or Mike's opinion, whether or not it qualified as evidence of compelling governmental interest?

A Can you restate that?

Q Sure. In other words, what you had indicated was as you recall nobody reviewed Sean's work to see whether or not the documents had the language that he said was in there?

A Right.

Q I understand that. And my question then is, or my understanding then is what you did was you took his draft report, you, Fran, Mike, and reviewed it among other things to see if there was any editorial mistakes; is that correct?

A Pretty much, yeah.

Q And my question was with regard to the information, the sentences, the statements, what Sean compiled in Appendix A that he said was derived from various documents, –

A Right.

Q – did you review that material to form an opinion as to whether or not that was evidence of a compelling governmental interest in your opinion?

A I think – well –

MS. BURROWS: And you are asking in the context of his task force review, right?

BY MR. OLSON:

Q In the capacity of however it was reviewed then, once the draft was given to you, and to Ms. Allegra, and Mr. Small –

A Mr. Allegra.

Q Mr. Allegra, excuse me.

A Fran.

Q I missed it yesterday. I missed again today another name. I apologize.

My question was whether or not the review process that the three of you undertook, or any one of you separately, whether or not that included making a determination as to whether or not the information that had been compiled by Sean in your opinion qualified as evidence of a compelling governmental interest?

A No. I didn't look at it that way. I was looking at it from the standpoint of Congress had enacted a statute, and Congress had found there was a

compelling interest, and this was the information that Sean had uncovered that touched on various areas that the Congress had said helps establish a compelling interest. So it was basically here is what we have to support the statute. And again, it was not the DOT statute, it was the Federal Procurement statute.

Q Okay, let's see if I collected everything that you said. Are you saying then that, I mean Sean's charge as you understand it was to collect data that would indicate that there was evidence of a compelling governmental interest before Congress; is that correct or no?

A Not exactly.

Q Okay.

A I think it was Congress had enacted this statute, and we were presuming that in so enacting the statute Congress had compelling interest for enacting the statute. What Sean did is compile a lot of reports and data which went to the various areas which the courts and Congress have said showed there was a discriminatory history that would affect DBE's ability to participate in federal contracting. So he was

charged with finding whatever reports are out there that would support the compelling interest.

Q And my question was once he completed his work and he presented a draft of it to you, did you look at it to determine whether or not in your opinion in fact what he had collected did support the existence of a compelling governmental interest as had been articulated by Adarand?

A I didn't review it in those terms, no.

Q Do you know whether or not Mr. Allegra or Mr. Small did?

A I don't know.

Q Do you know if anyone ever reviewed it in order to make a determination whether the work that Sean did, the material that he compiled in fact qualified as evidence that would be supportive of a compelling governmental interest?

A Well, I think it would be supportive of, certainly.

Q You made that determination?

A Well, all of the reports would support the finding of a compelling interest. You asked me if I

found that they established a compelling interest. I said I didn't review it in those terms to decide if it had established the compelling interest. You then said if it would support the compelling interest. It would all be some support for a compelling interest.

Q So then your review did include examining the data that Sean had collected to determine whether or not in your opinion it supported the existence of a compelling governmental interest?

A Well, I think -- I think -- I think that we are using the word supported differently.

Q Okay.

A So if you can use a different word, I think it would help the question.

Q Well, let me just tell you where I am going because I am not trying to trap you. What I really want to find out is whether you, Mr. Small, Mr. Allegra, or anyone else ever evaluated the work that Sean did in order to determine whether or not in your opinions based upon the work that you were then doing the data that was collected qualified as evidence of a compelling governmental interest.

PAGE 61

A I don't think anybody ever sat down and said this establishes the compelling interest, especially because the report was stated that it is not -- it was not intended to be comprehensive. It wasn't intended to summarize every piece of evidence, and every Congressional hearing, and every study there is out there that might support a compelling interest. It was these are the kinds of factors that go to establish compelling interest, and here are some studies and some reports that help, that help support each of those factors that would go to establishing the compelling interest.

Q And my question is, and I will try and track your words as closely as possible, given the opinion that you just shared, am I correct then that you, at least you, evaluated or examined the data that was collected in his report in order to determine in your own mind whether it did qualify as factors that would support the existence of a compelling governmental interest?

A Let me answer it this way. They were all factors that were relevant to the question of is there

CERTIFICATE OF SERVICE

Martin S. Kaufman, an attorney admitted to practice and in good standing before the courts of the State of New York and this Court makes the following affirmation under penalty of perjury:

On the 11th day of June, 2001 I served two copies of the Brief of Amici Curiae GEOD Corporation and Atlantic Legal Foundation on the attorneys for the parties to this case by depositing them, in an addressed, post-paid wrapper, in a mail depositary box under the exclusive care and custody of the U.S. Postal Service within the State of New York, addressed to said attorneys at the address they have designated for service of pleadings and other papers:

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Dated: June 11, 2001

Martin S. Kaufman

JUN 1 2001

(9)

Supreme Court, U.S.
FILED
JUN 1 2001
CLERK

No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.

Petitioner,

v.

NORMAN Y. MINETA,
SECRETARY OF TRANSPORTATION, ET AL.

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF SOCIAL SCIENCE AND COMPARATIVE LAW SCHOLARS IN SUPPORT OF NEITHER PARTY

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June 1, 2001

38 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. **Social Science Insights about the Lingering Effects of Discrimination** 2

B. **The Use of Racial Presumptions in the DBE Program** 12
   1. Racial Presumptions in the SBA Business Development (BD) Program 13
   2. Racial Presumptions in the SBA Small Disadvantaged Business (SDB) Program 15
   3. Racial Presumptions in the DOT Disadvantaged Business Enterprises (DBE) Program 17

C. **The Need for Social Science Methods to Achieve Narrow Tailoring** 18

D. **The Use of Social Science Methods in India to Tailor Group Preferences to Lingering Effects** 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

United States
Adarand Constructors v Pena, 515 U.S. 200 (1995) 2, 13, 19, 28

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STATUTES:

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TABLE OF AUTHORITIES-Continued

Page

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LEGISLATIVE HISTORY:

144 Cong. Rec. S1422. (1998) 11

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Page

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Page

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Page

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TABLE OF AUTHORITIES-Continued

Page

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INTEREST OF AMICUS CURIAE

This brief is filed on behalf of five university professors who have written on the subjects of racial inequality and affirmative action from social science and comparative law perspectives.[1] It is not filed on behalf of either petitioner or respondent and does not take a position as to whether the decision of the Court of Appeals in this case should be affirmed or reversed.[2]

SUMMARY OF ARGUMENT

When this Court held in 1995 that strict scrutiny should be applied to this case, Justice O'Connor provided the following much-quoted and discussed explanation: "The unhappy persistence of both the practice and the lingering effects of

[1] The members of the *amicus* group are Joshua Aronson, Assistant Professor, Department of Applied Psychology, New York University; Clark D. Cunningham, Professor of Law, Washington University in St. Louis; Marc Galanter, John & Rylla Bosshard Professor of Law and S. Asian Studies, University of Wisconsin-Madison and LSE Centennial Professor, London School of Economics; Glenn C. Loury, University Professor, Professor of Economics, and Director of the Institute on Race and Social Division, Boston University; and John David Skrentny, Associate Professor of Sociology, University of California-San Diego. This brief has been authored entirely by Clark D. Cunningham, counsel of record for *amicus curiae*, in consultation with the members of the *amicus* group. No one other than the members of the *amicus* group has made a monetary contribution to the preparation or submission of this brief. More information about the members of the amicus group and their scholarship is available on the Rethinking Equality in the Global Society Web Site: http://law.wustl.edu/Equality ("Equality Web Site").

[2] The preface to John David Skrentny's book *The Ironies of Affirmative Action* describes the same purpose which motivates these scholars to submit this brief: "Readers may justifiably expect this book to have a political agenda, either for or against affirmative action, since almost everything written about that controversial policy has such an agenda. This book, however, has no political agenda, unless one considers the desire to question fundamental assumptions on both sides and move tired debates forward ... If social scientists can find ideas that will help ... interested individuals on both sides of the issue ... better understand or rethink their positions on affirmative action, the book will have succeeded." *The Ironies of Affirmative Action: Politics, Culture & Justice in America ix* (1996).

racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors v Pena*, 515 U.S. 200, 237 (1995). Looking at the Department of Transportation (DOT) program for Disadvantaged Business Enterprises (DBEs) from a comparative law perspective and with insights from the social sciences suggests that it may be helpful to separate the problems of "present practice" and "lingering effects." This brief will ***not*** address the question of whether the record in this case shows that the DBE program is justified by a compelling interest to correct **present practices** of discrimination. Rather, this brief seeks to clarify how **lingering effects** can be a compelling interest even if it is assumed that there are no relevant present practices of discrimination. Racialized categories based on assumptions about conscious discrimination may be less relevant where the compelling interest is lingering effects, thus creating a need for an empirical basis to determine which groups are presently disadvantaged by the lingering effects of past discrimination and to support a system for periodic review of that determination. An affirmative action program thus designed with the benefit of social science methods should pass strict scrutiny.

ARGUMENT

A. Social Science Insights about the Lingering Effects of Discrimination

In his recent W.E.B. Du Bois lectures at Harvard University[3] economist Glenn C. Loury reached the following conclusion: "As an empirical judgment, I hold that reward bias -- unequal

[3] To be published as *The Anatomy of Racial Inequality* by Harvard University Press (forthcoming February 2002). Galley proofs of the book will be filed with the parties and the Court as soon as they are available indicating page references to quotations in this brief. The text of the DuBois lectures is currently available on the website of the Boston University Institute on Race and Social Division at http://www.bu.edu/IRSD/articles.htm

returns to equally productive contributors based on race, is now less important in accounting for the disparate social outcomes that history has bequeathed us than is developmental bias -- unequal chances to realize one's productive potential based on race." Loury's reference to "development bias" is based on his distinction, now widely accepted among economists and sociologists,[4] between "human capital" and "social capital." Human capital refers to an individual's own characteristics that are valued by the labor market; social capital refers to value an individual receives from membership in a community, such as access to information networks, mentoring and reciprocal favors. "*Whom* you know affects *what* you come to know and what you can *do* with what you know."[5] Thus potential human capital can be augmented or stunted depending on available social capital. Economic models developed by Loury and others demonstrate how labor market discrimination, even several generations in the past, when combined with ongoing segregated social structure can perpetuate indefinitely huge differences in social capital between ethnic communities.[6] These models have been corroborated by historians like Thomas Sugrue, whose research produced the following conclusions:

[4] See, e.g., Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, in *Women, Minorities and Employment Discrimination* 153 (P.A. Wallace ed.1977); James S. Coleman, *Foundations of Social Theory* (1990); Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 22 Annual Review of Sociology 1 (1998); Gary S. Becker & Kevin M. Murphy, *Social Economics* (2000).

[5] Glenn C. Loury, *Economic Discrimination: Getting to the Core of the Problem*, in *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America* 93, 103 (1995).

[6] See, e.g., Loury, supra note 4; Glenn C. Loury, *Intergenerational Transfers and the Distribution of Income*, 49 Econometrica 843 (1981); George Borgas, *Ethnic Capital and Intergenerational Mobility*, 107 Quarterly Journal of Economics 123 (1992); David M. Cutler & Edward L. Glaeser, *Are Ghettoes Good or Bad?*, 112 Quarterly Journal of Economics 827 (1997).

"[H]iring practices drew from and reinforced communal, religious and ethnic networks. ... In northern cities, building trades became a niche of *whiteness*, drawing their membership from ethnically diverse European American communities. Kinship still mattered, but union references also came from neighborhood friendship networks, schoolmates, and connections formed in churches and parochial schools. All of these networks shared one element: they did not include African Americans."[7]

In considering the ways in which racial discrimination can have "lingering effects," it may be helpful to consider another distinction offered by Loury, between "discrimination in contract" and "discrimination in contact":

" The phrase "discrimination in contract" is meant to invoke the unequal treatment of otherwise like persons based on race in the execution of formal transactions – the buying and selling of goods and services, for instance, or the interactions with organized bureaucracies, public and private. Discrimination in contract, in other words, is a standard means by which reward bias against blacks has been perpetrated. By contrast, "discrimination in contact" refers to the unequal treatment of persons on the basis of race in the associations and relationships formed between individuals in social life, including the choice of social intimates, neighbors, friends, heroes and villains. It involves discrimination in the informal, private spheres of life. ... Given that individuals socialized in the United

[7] *Breaking Through: The Troubled Origins of Affirmative Action in the Workplace* in *Color Lines: Affirmative Action, Immigration, and Civil Rights Options* 31, 41-42 (John David Skrentny, ed. 2001). See also Melvin Oliver & Thomas Shapiro, *Black Wealth, White Wealth* (1995) (relating vast black/white wealth gap to lingering effects of discrimination, particularly in housing markets); John Donohue & James Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 Journal of Economic Literature 1603 (1991).

States understand themselves partly in racial terms, and that they must in any liberal political order be endowed with autonomy regarding the choice of their most intimate associations, it is inevitable that the selective patterns of social intercourse that lead to discrimination in contact will arise."

This distinction is illustrated, in the context of this case, by the following statement quoted in the 1996 statement published by the U.S. Department of Justice, *The Compelling Interest for Affirmative Action in Federal Procurement*: "low bidding Hispanic contractor told that he was not given subcontract because the prime contractor 'did not know him' and that the prime 'had problems with minority subs in the past'." 61 Fed.Reg. 26042, 26059 n 100 (1996), (quoting BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-12 (1992)). The latter reason is obviously "discrimination in contract." But what if the first reason (I don't know you) was the only reason for rejecting the lowest bid? The prime contractor is not legally obligated to accept the lowest bid and indeed may be acting prudently in contracting with a higher bidder who is known to him. Personal familiarity is probably the best source of information about reliability and capacity to perform the work well and on time.

In Loury's earlier economic analyses, legally-permissible social segregation was relevant to "lingering effects" primarily because it perpetuated the inequitable distribution of social capital caused by racial discrimination imposed on prior generations. The unsuccessful bidder in the example above may not have personally known any other prime contractor nor have known other people who knew them. The bidder's own social network would thus have provided no useful social capital. Not only would there be no prime contractors within that person's circle of friends and relatives but the usual methods of forming new trusting affinities outside that circle -- such as in-law relationships, church membership, neighbors, parents of your children's friends -- would be blocked by legal

patterns of social segregation. Creating an incentive for the prime contractor to do business with this bidder not only acknowledges the present harm caused by past discrimination but also helps to eliminate its lingering effects by infusing social capital into the bidder's community. If the bidder does a good job on time, not only does the bidder become someone "known" to the prime contractor, but he also becomes "someone who knows someone" within his community.

In his recent DuBois lectures, however, Loury also links "discrimination in contact" with a form of "lingering effect" that is distinct from, although related to, unequal social capital. With specific reference to the current situation of African-Americans, he proposes that continuing patterns of social segregation be understood not "as some form of anti-black enmity" but rather in terms of "subtle dynamics ... of racially based social cognition" that he terms "stigma":

> "My use of the term 'racial stigma' alludes to [the] lingering residue in post-slavery American political culture of the dishonor engendered by racial slavery. It is crucial to understand that this is not mainly an issue of the *personal attitudes* of individual Americans. To reject my argument here with the claim that, 'stigma cannot be so important because attitude surveys show a continued decline in expressed racism among Americans over the decades,' is to thoroughly misunderstand me. I am discussing *social meanings*, not *attitudes* ... Discrimination is how about how people are treated; stigma is about who they are understood to be."

Research by Claude Steele, Joshua Aronson and a number of other psychologists provides evidence that racial stigma is indeed a very real lingering effect that continues to harm in ways that cannot be attributed to the present practice of intentional discrimination. Steele initially hypothesized that if a person fears that low performance in a particular testing situation will confirm a stigmatic stereotype, this felt "threat," which may have its influence below the level of conscious

awareness, is likely to depress the test performance.[8] Steele and Aronson have since accumulated an extensive set of experimental results that support this hypothesis, showing dramatically depressed scores for stigmatized group members that cannot be attributed to bias on the part of test designer nor to inferior skills of the test taker.[9]

Although Steele and Aronson's research is most directly relevant to affirmative action in higher education, Loury has suggested ways in which stereotypes and stigma rooted in past discrimination can have lingering effects on the market economy in a similar ironic way by modifying black behavior so as to confirm the stereotype. Ian Ayres, who is both an economist and a legal scholar, has reported the results of empirical research on retail car negotiations showing that black

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[8] Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 American Psychologist 613 (1997). See also Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, 284 Atlantic Monthly 44 (Aug. 1999) (available on the Web at http://www.theatlantic.com/issues/99aug/9908stereotype.htm)

[9] In one experiment white and black students at Stanford University were given 27 especially difficult questions from the verbal sections of past Graduate Record Exams. In the "diagnostic" test group, students were told that their abilities were being measured while in the "non-diagnostic" group, they were told the purpose of the experiment was "to examine the psychology of problem solving." The performance of black and white students in the non-diagnostic group, adjusted for each individual's pre-existing SAT verbal score, was identical (12 correct answers). However, in the diagnostic group the black students performed worse (8 correct answers) while the white students performed at the same level (12 correct answers). Claude M. Steele & Joshua Aronson, *Stereotype Vulnerability and African-American Intellectual Performance*, *Readings about the Social Animal* 409, 412 (Joshua Aronson ed., 7th ed., 1995). See also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 Journal of Personality and Social Psychology, 797 (1995). Other researchers have replicated their results and the stereotype threat theory is now widely accepted within the field of psychology. See, e.g., M. Inzlicht & T. Be-Zeev, *A threatening intellectual environment. Why females are susceptible to experiencing problems solving deficits in the presence of males*, Psychological Science, 11, 5, 365.371 (2000).

male testers received final offer mark-ups that were twice as high as those given white male testers. *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991). Although the behavior of the car retailers may indeed have been motivated by conscious racial bigotry, Loury proposes the following model that could also explain these results:

> "Suppose automobile dealers think black buyers have higher reservation prices than whites – prices above which they will simply walk away rather than haggle further. On this belief, dealers will be tougher when bargaining with blacks, more reluctant to offer low prices, more eager to foist on them expensive accessories, etc. Now, given that such race-based dealer behavior is common, blacks would come to expect tough dealer bargaining as the norm when one shops for cars. As such, a black buyer who contemplates walking away would have to anticipate less favorable alternative opportunities and higher search costs than would a white buyer who entertains that option. And so, the typical black buyer might find it rational to accept a price rather than continue searching elsewhere, even though the typical white might reject that same price. Yet, this racial difference in typical buyer behavior is precisely what justified the view among dealers that a customer's race would predict bargaining behavior. Thus, even if there are no intrinsic differences in bargaining ability between the two populations, an equilibrium can emerge where the dealers' rule of thumb, "be tougher with blacks," is all too clearly justified by the facts."

This model predicts a particularly insidious form of lingering effect. Outright racial bigotry in an earlier generation of car dealers, based on the stereotype of blacks as naive and foolish consumers, would condition black consumer expectations and bargaining behavior. A current generation of car dealers, who considered themselves free from bigotry, would engage in a

"race-neutral" practice of hard bargaining and "learn" from repeated interactions that they can safely demand higher prices from black consumers, thus reinforcing the stereotype born in bigotry and maintaining a racial inequity in the market for automobiles.

The disparity between test scores among the students studied by Steele and Aronson and between car prices offered to the testers in Ayres' study simply cannot be adequately explained without reference to race. The disparity should not be attributed to innate racial differences in test-taking ability or consumer sophistication. Yet, this racial disparity can be explained without assuming bigotry on the part of either the test givers or car retailers.

Such social science findings as discussed above, that show how racial discrimination practiced by past generations can have powerful continuing effects in the present, make clear the importance of including "lingering effects" along with "present practice" in the definition of compelling interest set forth by this Court in the 1995 *Adarand* decision. Loury poses the following question in his DuBois lectures: "[S]houldn't somebody learn what is going on and intervene to short-circuit the feedback loop producing this inequality?" Obviously the federal government is uniquely situated to attempt such intervention. In the particular context of the DBE program, DOT is in the position of what Loury terms a "monopolistic observer":

> " A competitive situation is one where there are a large number of observing agents, each encountering subjects from an even larger, common population, each taking actions in relation to these subjects but knowing that, due to their relatively insignificant size, no action they can take will affect the population's characteristics. A monopolistic situation is one where a single observing agent (or a quite small number) acts on a population of subjects. ... [I]f a small employer ... learned or was told about such feedback effects, there would be nothing to be

done because, in a competitive situation, an individual's action has so little impact on the overall observing environment.[10] ... [On the other hand, a monopolistic observer might] see the racially disparate outcome as being anomalous or surprising ... [and] therefore find it to be *in his own self-interest* to experiment, so as to learn about the structure that is generating his observations."

As a monopolistic purchaser of construction work on a huge scale, the DOT is in a key position to acquire information about lingering effects of racial discrimination and experiment with ways to alter market and social mechanisms that perpetuate those effects. As Loury points out, 'if agents do not learn about mechanisms within their control that reproduce inequality through time, the results could be tragic ..." This account is consistent with DOT's own explanation for continuing the DBE program after re-evaluating it in light of the 1995 *Adarand* decision: "The most significant evidence demonstrating the need of a goal-oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program." *Participation by Disadvantaged Business Enterprises in Department of Transportation Programs: Final Rule*, 64 Fed. Reg. 5096, 5102 (Feb. 2, 1999) (Supplementary Information: Background). The DOT quoted extensively from Congressional debates in 1998 over the Transportation Equity Act for the 21st Century (TEA-21) which contained a provision retaining the DBE program. In particular the DOT cited the following statement by Senator Robb:

"Where DBE programs at the State level have been eliminated, participation by qualified women and

[10] For example, in Loury's model, a retail car dealer who was troubled about a pattern of higher prices paid by black consumers for the same vehicles could not alter black consumer behavior simply by changing his own bargaining practices, by offering black consumers the same deal as white consumers. Such an idealistic car dealer would simply end up making less money than the other dealers in the community who continued to assume correctly that black purchasers would accept higher prices.

qualified minorities has plummeted. There is no way to know whether this discrimination is intentional or subconscious, but the effect is the same. This experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunity to women and minorities, passivity equals inequality." Id. at 5101, citing 144 Cong. Rec. S1422. (1998).

Of course it is possible that the virtual disappearance of DBE subcontractors in the absence of affirmative action incentives for prime contractors might have been in part due to DBE inability to submit the lowest bids or, as discussed above, bids viewed as most likely to be performed per specifications and on time. Prime contractors who accept the lowest bids, or prefer bidders they know personally, are not obviously engaging in "reward bias" discrimination, but the inability of DBE contractors to win a competitive bidding process might nonetheless be the product of the "lingering effect" of "development bias." The most significant point made by Senator Robb is that government should not be a passive participant in an unregulated market for highway construction work even if the government is not yet able to trace all the complex and subtle causes of the situation.[11] As this Court said in the 1995 *Adarand* decision that "government is not disqualified from acting in response" to such a situation.

[11] The DOT cites a statement by Senator Baucus that DBE participation in the state-funded portion of the highway program in Michigan fell to zero in a nine month period after the state terminated its DBE program, while the federal DBE program in Michigan was able to maintain 12 percent participation, id. citing 144 Cong. Rec. S 1404, and a follow up statement by Senator Kerry, "[I]s that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, when they lose the incentive to do so, to drop down to zero [?] .... You could not have a more compelling interest if you tried" id. citing 144 Cong. Rec. S1409-10. The Congressional debates described similar drastic drops in DBE participation when affirmative action programs in state or local government procurement ended in California, Florida, Louisiana, Missouri, Nebraska, and Pennsylvania. Id.

In redesigning the DBE program -- proceeding in response to the 1995 *Adarand* decision through the process of legislative deliberation and administrative rule-making -- the federal government seems to be trying to "experiment" in just the ways a monopolistic agent should act, according to Loury, and is recruiting state governments as partners in this endeavor. States who engage in DOT-funded highway construction are required to compile and analyze data to estimate the level of DBE participation in such construction to be expected "absent the effects of discrimination"[12] including a possible adjustment to "account for the continuing effects of past discrimination." 49 C.F.R. § 26.45(b) and (d)(3). Each state must then submit to DOT an annual overall state-wide goal that reflects this "discrimination-free" estimate of DBE participation. The state must then endeavor to meet this state-wide goal through "race-neutral" means and is only permitted to set contract-specific goals for DBE participation if the race-neutral approach is not expected to meet the overall state goal. The current DBE program thus attempts to determine empirically in each state whether there are lingering effects of discrimination affecting the market in highway construction work and whether affirmative action is needed to prevent perpetuation of those effects. The critical question is whether the "racial presumptions" central to the DBE program are narrowly tailored to this endeavor.

B. THE USE OF RACIAL PRESUMPTIONS IN THE DBE PROGRAM

The Department of Transportation's program for Disadvantaged Business Enterprises was developed in response to a Congressional mandate that "not less than 10%" of federal highway funds be expended "with small business concerns owned and controlled by socially and economically

[12] This estimate takes into account discrimination in the private market. See Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 Columbia L. Rev. 1577 (1998).

disadvantaged individuals."[13] The DBE program is thus built on the concept of "social and economic disadvantage" which came from two pre-existing programs of the Small Business Administration: (1) the Minority Small Business and Capital Ownership Development (BD) program authorized by Section 8(a) of the Small Business Act, and (2) the Small Disadvantaged Business (SDB) program for federal contracts authorized by Section 8(d) of the Small Business Act. Originally this case challenged the constitutionality of the SDB program because Adarand Constructors lost its bid to be a subcontractor on a federal construction contract. It appears from the Court's definition of the questions presented on certiorari that the case now also addresses the constitutionality of the DBE program, even though the DBE program relates to state highway construction contracts, funded by DOT, rather than the kind of direct federal contract that give rise to this litigation. Even though the constitutionality of the BD program is not directly at issue in this case, the SDB and DBE programs cannot be fully understood except by reference to the BD program.

1. Racial Presumptions in The SBA Business Development (BD) Program

Unlike the SDB and DBE programs, the BD program is not limited to government-funded contracts; however, many (but not all) of its definitions and procedures for determining "social and economic disadvantage" are incorporated by reference into the SDB and DBE programs. The statutory provision creating the BD program -- unlike the provisions underlying the SDB and DBE programs -- does not create a presumption of disadvantage based on membership in a specified racial group. Racial identity is mentioned in the BD statutory provision only

[13] The most current source of this mandate is Section 1101(b) of the Transportation Equity Act for the 21st Century, Public Law 105-178, signed into law on June 9, 1998, to be found at 112 Statutes at Large 113-115 (1998).

as a possible direct cause of social disadvantage, and indirect cause of economic disadvantage:

> "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C § 637 (a) (5), (6)(A)

The SBA regulations that implement the BD program do, however, create a presumption of social disadvantage based on membership in one of five designated groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans. 13 C.F.R. § 124.103 (b). Membership in one of these groups does not give rise to a presumption of economic disadvantage, which is instead determined by reviewing an applicant's "personal narrative" describing his or her economic disadvantage, supported by personal financial information. 13 C.F.R. § 124.104.

The SBA also has authority to designate additional groups that are "socially disadvantaged." 13 C.F.R. § 124.103(d)(2) allows "representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias" to petition the SBA to be included as a "presumptively socially disadvantaged group."[14]

[14] Under the DOT regulations, if the SBA adds a new group to its "rebuttable presumption" list, that group then is also added for purposes of the DBE program.

2. Racial Presumptions in The SBA Small Disadvantaged Business (SDB) Program

In contrast to the BD program, the statutory provision authorizing the SDB program for federal contracts does contain a presumption of disadvantage, which applies to both social and economic disadvantage. Section 8(d) of Small Business Act requires that most federal contracts include a clause requiring the contractor to give small business concerns owned by socially and economically disadvantaged individuals "the maximum practicable opportunity" to participate in subcontracts. The required clause further directs the contractor to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C § 637(d)(3)(C).

Although this statutory language remains in place, the decision of the Court of Appeals which is the subject of this certiorari petition concluded that current federal regulations implementing the SDB federal contracting program have eliminated "the race-based presumption of economic disadvantage." *Adarand Constructors v Slater*, 228 F.3d 1147, 1185 (2000). The Court of Appeals cited two different chapters of the Code of Federal Regulations in support of this conclusion: Chapters 48 and 13. Chapter 48 contains the Federal Acquisition Regulation. The three sections of Chapter 48 cited by the Court of Appeals all simply refer to Chapter 13, part 124, subpart B, which contains SBA regulations, indicating that the procuring federal agencies are relying on the SBA for the definition of "small disadvantaged business" and certification of eligible SDBs pursuant to that definition. The Court of Appeals then cited only one section from the SBA regulations on the SDB program, which answers the question, "What is a Small Disadvantaged Business (SDB)?":

"(a) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, **unless otherwise provided in this subpart**." 13 C.F.R. § 124.1002(a) (2001) (emphasis added).

Because "subpart A of this part" refers to the BD regulations (the 8(a) program), the Court of Appeals apparently interpreted this reference as eliminating "the discrepancy between individualized determination of economic disadvantage characterizing the 8(a) program and the non-individualized presumption of economic disadvantage characterizing the 8(d) [i.e. SDB] program." 228 F.3d at 1185. However, the Court of Appeals did not pay sufficient attention to the "unless otherwise provided" qualification at the end of the subsection. In a later section of the SDB regulation entitled "Disadvantaged determination," the SBA clearly states:

"Those individuals claiming disadvantaged status that are members of the same designated groups that are presumed to be socially disadvantaged for purposes of SBA's 8(a) BD program (see 124.103(b)) are presumed to be socially **and economically** disadvantaged for purposes of SDB certification." 13 C.F.R. § 124.1008(e)(1) (2001) (emphasis added).

Because SBA regulations for the BD program designate "Black Americans, Hispanic Americans, Native Americans, [and] Asian Pacific Americans" as groups presumed to be socially disadvantaged, 13 C.F.R. § 124.103(b), members of such groups **are** presumed to be also economically disadvantaged for purposes of the SDB federal contract program, thus making the SDB implementing regulations consistent with Section 8(d) of the Small Business Act.

The misinterpretation of the SDB regulations by the Court of Appeals is a critical error, because the Court of Appeals

explicitly stated that SDB program would **not** be narrowly tailored "insofar as it obviates an individualized inquiry into economic disadvantage." 228 F.3d at 1184. It thus appears that the Court of Appeals would have ruled in favor of petitioner Adarand Constructors had the court correctly interpreted the SDB regulations.

3. Racial Presumptions in the DOT Disadvantaged Business Enterprises (DBE) Program

The statutory provisions that have authorized the DBE program do not appear in the compiled U.S. Code and are only to be found attached to successive appropriation bills, the most recent being Section 1101(b) of Pub. L. No. 105-178, 112 Stat. 113 (1998). This provision, like its predecessors, does not explicitly contain a racial presumption but instead states that the

"term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C § 637(d)) [i.e. the SBA's SDB federal contract program] and relevant subcontracting regulations promulgated pursuant thereto"

The statute does direct the Secretary of Transportation to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." 112 Stat. 114. The DBE regulations this Court discussed at length in its 2000 *Adarand* decision, *Adarand Constructors v Slater*, 120 S.Ct. 722, 725-26, were promulgated pursuant to this directive. Although the DBE regulations relate to state highway construction contracts (that received DOT funds), the regulations are nonetheless relevant to the specific facts of this case, even though it originally involved a federal highway construction contract. As this Court pointed out, "DOT does not itself conduct certifications [of DBE status], but relies on certifications from two main sources: the Small Business Administration ... and state highway agencies, which certify them for purposes of federally assisted

highway projects." 120 S.Ct. at 723. Adarand Constructors lost out in its bid for a guardrail subcontract to a company that had been certified under the DBE regulations by the state department of transportation. Id. at 724.

The racial presumption of both social and economic disadvantage appears independently in the DOT regulations along with a list of presumptively disadvantaged groups that parallels the list in the SBA's regulations but also specifically defines the terms "Black Americans" and "Hispanic Americans." 49 C.F.R. § 26.5 Thus even if the Court of Appeals correctly interpreted the SBA's regulations for the SDB federal contracting program as eliminating the racial presumption of economic disadvantage, this presumption still survives in the DBE regulations and is thus relevant to this case -- even if Adarand Constructors' claims are construed narrowly to apply only to direct federal highway contracts such as the one giving rise to the litigation.

C. THE NEED FOR SOCIAL SCIENCE METHODS TO ACHIEVE NARROW TAILORING

Although the phrase "narrow tailoring" appears both in cases involving judicially created remedies and affirmative action programs developed by the other branches of government, the phrase seems to have somewhat different meaning in these two different contexts. When reviewing a trial judge's injunction intended to desegregate public schools or remedy employment discrimination, "narrow tailoring" draws upon historic principles of equity law. Because a judge sitting in equity has potentially vast discretionary powers, a reviewing court will look closely at whether the injunctive relief is "narrowly tailored" to the evidentiary record as to injury. In this context, narrow tailoring operates as a constraint only on judicial power.

When reviewing an affirmative action plan created by a legislature or executive agency, "narrow tailoring" cannot mean

that the legislature or agency is treated either as plaintiff with a burden of proof to carry or as a trial court whose power is limited to remedying specific injuries proven by the parties before it. Instead, when reviewing legislative and agency action, narrow tailoring instead seems more focused on "smoking out" true motives rather than assuring that all relevant facts have been established and used to design the most limited effective remedy:

> "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493 quoted in, *Adarand* 515 U.S. at 226.

The narrow tailoring test when applied to the other branches is particularly intended to reveal whether "classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Id. Thus in the *Croson* case the inclusion of "Aleuts" was problematic not so much because Aleuts might receive an undeserved benefit but because this "random inclusion ... suggests that perhaps the city's purpose was not in fact to remedy past discrimination." 488 U.S. at 506.

In 1994 George R. LaNoue and John C. Sullivan began their analysis of the SBA's decisions about which groups should be entitled to affirmative action with these words: "[I]n affirmative-action terms, minorities have become almost universally defined as blacks, Hispanics, Asians, and Pacific Islanders, Native Americans, Eskimos, and Aleuts. But why? The Supreme Court keeps challenging governments for an answer, without a definitive response." *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 Journal of Policy

History 439-40 (1994). Their statement remains true today; even the record in this case is remarkably silent on this question. Adarand Constructors contends that the phrase "socially and economically disadvantaged" is really just a proxy for racial categories. After an exhaustive review of SBA records obtained pursuant to the Freedom of Information Act, LaNoue and Sullivan came to a similar conclusion:

> "Examining this record, it is difficult to discern any consistent application of the agency's published procedural or substantive standards. ...[T]he relative economic disadvantage of groups is quantifiable and the data were often available from census records. The SBA never used the data and never analyzed them when petitioners [seeking to be added to the list of presumptively disadvantaged groups] introduced them, but instead employed a hodgepodge of rationales that appear to be largely pretexts for its decisions. ...On the other hand, when the agency did expand eligibility ... it did so without any independent examination of the actual social or economic status of those groups in America." Id. at 461

According to LaNoue & Sullivan, the SBA's list of disadvantaged groups has its earliest origins in the list of "minority groups" that appeared in Standard Form 40, developed by President Kennedy's Committee on Equal Employment Opportunity, to be used solely for statistical reporting purposes in employment prior to the Civil Rights Act of 1964. Id. at 440-44. This list, and its successor incorporated into Reporting Form EEO-1, necessarily was based on racialized categories of appearance because employers who filled out these forms were instructed to avoid asking employees which group they belonged to, but were to rely on only visual identification.[15]

[15] John David Skrentny, *The Minority Rights Revolution* 29 (pre-publication draft 2001). Polish leaders were told that Poles could not be added to the reporting form because employers could not be expected to identify them visually. Id. at 439. (Based on correspondence between author and Herbert Hammerman, EEOC's Chief of Reports in the 1960s.)

> "When affirmative-action concepts changed and the racial and ethnic categories used for reporting were transformed into requirements for proportional representation in the workforce and other areas, there was still virtually no debate about which groups should be included. The concept of who was a minority was passed from program to program with very little reconsideration." LaNoue & Sullivan at 441.

The government's failure to re-assess its listing of "official minorities" can create an appearance of "random inclusion" that undermines the credibility of a program justified primarily in terms of remedying the lingering effects of past discrimination.

The problem is that although members of all five groups listed in the DBE program might share common vulnerability to current practices of racialized "reward bias," they differ greatly in terms of how their group membership might indicate "development bias." For several of the designated groups a very significant percentage are first or second generation immigrants. Also social science data indicate that the extent of contemporary social segregation differs considerably among the groups.[16] To the extent that eliminating "lingering effects" is the compelling interest for the DBE program, the undifferentiated aggregation of the five groups into a single presumption of disadvantage does create a risk of overinclusion. The development and implementation of state-wide goals might be particularly distorted by this problem. It appears that the regulations require that all existing DBEs, and all persons who might be potential DBE owners absent the lingering effects of discrimination, be counted as a single total for setting the goal and measuring progress toward achieving

[16] See John David Skrentny, *Affirmative Action and New Demographic Realities*, The Chronicle of Higher Education B7 (February 16, 2001); *Urban Inequality: Evidence from Four Cities* (Alice O'Connor, Chris Tilly & Lawrence Bobo, eds.,2000).

the goal. See 49 C.F.R. § 26.45(h). If the analysis set forth above is correct, persons from groups least affected by intergenerational effects of past discrimination and current patterns of social segregation may be more likely to be successful competitors in the market for highway construction. Automatically presuming such persons as disadvantaged might not only expand the scope of the DBE program beyond that justified by the "lingering effects" rationale, but also creates the risk of not really addressing the "lingering effects" problem. It is possible that participation of DBEs from less disadvantaged groups might therefore comprise a high proportion of all DBE contracting in a state, disguising a continuing failure to assist persons whose group membership is actually more indicative of "lingering effects,"thus depriving the government of the kind of feedback information needed to learn how to break the tragic cycle that reproduces inequality over time.

Excessive reliance on racialized categories could also result in seriously disadvantaged groups being erroneously excluded. For example, it is frequently asserted that "Asian Americans" do not need affirmative action because socioeconomic indicators show that "they" are better off than the average American. The following table seems to support such assertions.

1980 Census Data[17]

	% college grads	% unemployed	Relative family income	Poverty rate
All Americans	16.2	6.5	1.0	9.6
Asian-Americans	34.3	4.6	1.19	10.3

[17] George R. LaNoue & John C. Sullivan, *Group Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103, 131 (2000), citing *Civil Rights Issues Facing Asian Americans in the 1990s* 12-13 (U.S. Civil Rights Commission 1992).

However, when the racialized category of "Asian Americans" is broken down into national origin groups, one can see by comparing "All Americans" with lines 3-5 the error of such a "better off" generalization.

	% college grads	% unemployed	Relative family income	Poverty rate
All Americans	16.2	6.5	1.0	9.6
Asian-Americans	34.3	4.6	1.19	10.3
Vietnamese	12.9	13.4	0.65	33.5
Laotian	5.9	15.3	0.26	67.2
Cambodian	7.7	10.6	0.45	46.9
Hmong	2.9	20.0	0.26	65.5

When an even more precise category --- ethnicity -- is used to separate the Hmong in line 6 from other Laotians, one can see even more severe indications of disadvantage (e.g. 2.9% college graduates, 20% unemployment -- the worst of any the groups listed)

The goal of narrow tailoring might be well served if the SBA commissioned an independent group of experts to advise it on reevaluating group designation. John Skrentny has recently called for the creation of a commission "to measure equal opportunity, throwing out all of the old assumptions and asking fresh questions." The report produced by such a commission "should not infer patterns of discrimination solely from statistics of employment representation or compensation, but should also include the 'tester' studies favored by some civil-rights groups, whereby persons of varying races and ethnicities apply for jobs, housing, or loans at the same places, and the results are compared. Further, a truly comprehensive report would use interviews, and cull the results of past and new ethnographic studies of the role that discrimination may play in

American life." *Affirmative Action and New Demographic Realities*, The Chronicle of Higher Education B7, B10 (February 16, 2001)

Unfortunately there are some dicta scattered through affirmative action case law that may discourage agencies like the SBA from undertaking such an empirical inquiry. For example, this Court in *Croson* expressed concern that affirmative action programs based on past "societal discrimination" would become "lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." 488 U.S. at 505-6. The Court went on to quote in part from the following famous statement by Justice Powell in his Bakke opinion:

> "There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. ... As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence ..." 438 U.S. at 295-97

It is important to note, though, that Justice Powell was speaking about "judicial competence." It is one thing for the judicial branch to say that it cannot "measure" the effects of past discrimination and quite another to assert that neither of the other branches are capable of doing so.

There is one major country in the world that has a longer history -- a much longer history -- than the U.S. of designing and evaluating affirmative action programs: India. India's

experience shows without a doubt that it is possible to design a program to remedy the effects of past discrimination in which beneficiary groups are designated through an objective process based on empirical research. A comparative study of India also illustrates the crucial role played by the courts in causing such a process to develop and keeping it free of "illegitimate notions of inferiority" and political pandering to ethnic voting blocks. The suggestions at the end of this brief for modifying the DBE program to maximize "narrow tailoring" are inspired in large part by studying India's approach to affirmative action.

D. THE USE OF SOCIAL SCIENCE METHODS IN INDIA TO TAILOR GROUP PREFERENCES TO LINGERING EFFECTS

Since the adoption of its Constitution in 1950, India has afforded an extensive program of affirmative action to a set of caste groups known as Scheduled Castes (the former "untouchables") and a set of tribal groups known as Scheduled Tribes, which together constitute about 22 percent of the total population. In addition, it has provided more selective affirmative action measures to a number of groups within Indian society, defined by the Constitution as "socially and educationally backward classes," who have suffered from a history of economic exploitation and social segregation comparable in some measure to that suffered by the untouchables.[18] The concept of "social and educational backwardness" can be seen as an Indian version of Loury's "developmental bias" and thus suggests a point of comparison

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[18] For a brief overview of India's approach to affirmative action, see Clark D. Cunningham, *Affirmative Action: India's Example*, 4 Civil Rights Journal 22 (1999) and Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste ...? Rethinking Affirmative Action*, 97 Michigan Law Review 1296 (1999) (both on Equality Web Site). The classic account is Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (1984).

with the idea of "social and economic disadvantage" in the DBE program.

From 1951 through 1990, individual Indian states were left on their own to develop criteria for providing preferential treatment in higher education and government employment to what came to be known as OBC's ("other backward classes"). A recurrent problem developed: the extension of affirmative action to caste groups apparently based on more on their political clout in a particular state than their actual need for preferential treatment relative to other groups, leading to repeated Supreme Court decisions ordering states to redesign their programs using more objective and transparent processes.[19] Dissatisfaction with the state-level approaches led to appointment of a Presidential Commission in 1980 (known as the "Mandal Commission" after the name of its Chairperson), which issued a comprehensive report and set of recommendations for national standards. The Mandal Commission conducted a national survey that started with generally recognized group categories (typically based on caste name or hereditary occupation) and tested each group using standardized criteria of "backwardness" (such as comparing the percentage of group members who married before the age of 17 or did not complete high school with other groups in the same state).

Implementation of the Mandal Report was announced by the Prime Minister in 1990 but delayed until the Supreme Court reviewed various constitutional challenges to its methodology and recommendations. In 1992 the Supreme Court approved most of the recommendations of the Mandal Report in *Indra Sawhney v Union of India (I)*, 1993 All India Reports (S.Ct.) 477. Two aspects of the Sawhney decision provide particularly

[19] For a concise overview of this history see Clark D. Cunningham & N.R. Madhava Menon, *Seeking Equality in Multicultural Societies* (n.d. on Equality Web Site). For greater detail see Sunita Parikh, *The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India* (1997).

interesting points of comparison with the case now before this Court. First, the Court approved the basic assumption of the Mandal Report that *neither* traditional caste categorization nor economic status, standing alone, was a sufficient basis for classifying a group as an OBC. Traditional caste categories can be used as a starting point for identifying OBCs but selection criteria must include empirical factors beyond conventional assumptions that certain castes are "backward." Second, the Court added a new criteria for affirmative action eligibility. The Court ruled that OBC membership only creates a rebuttable presumption that a person needs preferential treatment; therefore, the state must also use an individualized economic means test to eliminate persons from affluent or professional families (termed "the creamy layer test"). This creamy layer test looks to the occupation and income of a person's parents, an approach consistent with Loury's economic theory that distinguishes between "human capital" and "social capital." The creamy layer test apparently assumes that if one's parent has achieved substantial occupational and financial success (perhaps despite suffering personal discrimination) the parent will pass on that social capital to the child, thus minimizing the "lingering effects" of discrimination. The creamy layer test thus responds to two different criticisms of affirmative action commonly voiced in the United States: (1) that many affirmative action beneficiaries come from privileged backgrounds and don't really need affirmative action and (2) that affirmative action benefits do not reach the "truly needy" because they are monopolized by more privileged members of the group. Each state in India was directed to add a "creamy layer" test to its programs to benefit OBCs.

In 1996 the Supreme Court of India struck down a definition of the "creamy layer" by two state governments that arbitrarily set the threshold for parental wealth and status so high as to make the test ineffective. *Ashoka Kumar Thakur v. State of Bihar*, 1996 All India Reports (S.Ct.) 75. In *Indra Sawhney (II)*, 2000 All India Reports (S.Ct.) 489, the Supreme Court of

India had to contend with another state government that "declared" by state legislation there was no "creamy layer" among any of the backward classes in that state. The Supreme Court appointed its own commission to establish an interim creamy layer set of criteria for that state and then implemented the commission's recommendations. The Court pointedly observed that the state's refusal to implement a creamy layer test "appears to have been taken because the real backward [classes] have no voice in that decision-making process." Id. at 521.

Both the American DBE and the Indian OBC programs begin with a general, abstract category of "disadvantage" or "backwardness" and claim to be providing preferential treatment to specific ethnic groups only because they happen to fit into the category. Both programs insist that disadvantage can not be explained solely in economic terms; for both social disadvantage provides the rationale for using ethnicity to identify and delimit beneficiary groups. The requirement of an individualized determination of economic disadvantage under the SBA's BD program resembles India's "creamy layer test," although the Supreme Court of India requires that specific, objective economic criteria be set out, such a specific cut-off for parental income or extent of agricultural land owned. It is important to note that the Supreme Court of India does not itself decide whether any particular group is appropriately classified as eligible for affirmative action; rather, strict scrutiny in India focuses on the procedures and criteria used. Perhaps the key to the Indian approach is that criteria and procedures for deciding whether a group is sufficiently disadvantaged are announced in advance, and then applied on the basis of empirical research. This approach helps assure that classification is not "the product of rough compromise struck by contending groups within the democratic process," *Bakke*, 438 U.S. at 299 (opinion of Powell, J) or as this Court said in the 1995 *Adarand* decision, "simple racial politics," 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (plurality opinion of O'Connor, J.)).

CONCLUSION

Only one statutory provision prevents the SBA and DOT from engaging in more effective tailoring of the concept of "social and economic disadvantage" to the problem of remedying the lingering effects of past discrimination. That provision is the phrase requiring federal contractors to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans" in Section 8(d) of the Small Business Act. If Congress simply removed the words "and economically," then the DOT would be free to amend its regulations to conform to the SBA's BD program that requires an individualized determination of economic disadvantage. This change alone (which the Court of Appeals believed has already taken place) would go a long way toward tailoring the DBE program more closely to the lingering effects problem. However, India's experience with implementing its comparable "creamy layer" test suggests that the DOT and SBA would be well advised to promulgate objective criteria of economic disadvantage susceptible to judicial review to avoid the appearance or reality of an illusory economic means test that leaves racialized categories essentially unchanged.

If Congress removed the entire mandatory presumption phrase from Section 8(d), then the SBA would be free to re-assess the list of disadvantaged groups using the kind of social science methods urged by John Skrentny and demonstrated by India's approach to affirmative action. Again, India's experience suggests that the SBA would be well-advised (and perhaps should be required) to "start fresh" and also to re-examine the list on a periodic basis, perhaps triggered by the ten-year census.

The following allegory about affirmative action, circulating in academic circles, has its origins in remarks made by Glenn Loury at a 1997 conference. Imagine a mad bomber with a stockpile of biological and radiation weapons. The bomber

takes a state map where every county is marked. He colors some counties red, some green, some blue. Taking that map aloft, he drops biological weapons on the red counties, radiation weapons on the green counties, and all that he has left of both kinds on the blue counties. He then kills himself in a suicide crash. Although many residents of the targeted counties become ill almost immediately, the terrible extent of the harm he caused becomes suspected only as the years go by and public health officials begin to notice patterns of cancer and birth defects. The situation is complicated not only by the varying pattern of bombing, but also by the passage of time as people move out of the targeted counties, carrying illness with them, and others move into the counties where the still potent effects of the bombing linger. Perhaps with massive data collection and sophisticated analysis, the government might eventually be able to reconstruct the pattern of bombing and precise weapons used on each county. But what if the bomber's map has been discovered in the rubble of his crashed plane? Of course the government should refer to the map in order to restore public health. And that is the goal of a well-designed affirmative action plan: to use a map that projects the complex patterns of past and continuing discrimination onto the current geography of our nation to guide the uncertain but essential task of restoring social and economic health for the victims of that discrimination.

In the allegory it is obvious that the long-lasting public health crisis will not go away by pretending that the map does not exist or by prohibiting officials from using it. If there was a judicial role in the story, it would be to make sure that government has, in fact, the right map, and is indeed using it in order to remedy the harm the bomber caused.

Respectfully submitted,
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No. 00-730

In the

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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31 pp

QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

INTRODUCTION 4

ARGUMENT 5

I. THE HISTORY OF CIVIL RIGHTS LITIGATION DEMONSTRATES THAT THE EQUAL PROTECTION COMPONENT OF THE CONSTITUTION SHOULD BE INTERPRETED TO PROHIBIT BOTH RACE-BASED PREFERENCES AND DISCRIMINATION 5

A. The Initial Promise of Equality Betrayed by *Dred Scott* and *Plessy* 6

B. *Brown* Seeks To Remove the Use of Race from Government Decisionmaking 7

C. The Civil Rights Act of 1964 Enacted To Prohibit Discriminatory Preference 9

D. Civil Rights Jurisprudence Reverts To Authorizing Race Preferences 12

E. California Returns to Color-Blind Jurisprudence .. 16

II. THE STATUTORY RACE PREFERENCES FAIL THE *CROSON* TEST 18

A. The Statutes' Findings Fail the *Croson* Mandate To Identify Specific Discrimination 18

B. The Federal Race-Preference Program Is Not Remedial but Merely Seeks Racially Proportional Participation 20

TABLE OF CONTENTS—Continued

Page

C. The Chosen Remedy of Preference Lacks Any Nexus To, and Does Nothing To Correct, the Purported Violation 21

D. The Race-Preference Statutes Make No Attempt To Restrict Their Benefits To Victims of Past Discrimination 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 14-15, 21

Adarand Constructors, Inc. v. Slater,
228 F.3d 1147 (10th Cir. 2000) 3, 5

Alexander v. Sandoval, 149 L. Ed. 2d 517 (2001) 2

Anderson v. Martin, 375 U.S. 399 (1964) 8

Associated General Contractors of California, Inc. v. City and County of San Francisco,
813 F.2d 922 (9th Cir. 1987) 1

Bolling v. Sharpe, 347 U.S. 497 (1954) 19, 23

Brown v. Board of Education,
347 U.S. 483 (1954) 7-8, 14

Brown v. Board of Education,
349 U.S. 294 (1955) 9

Buchanan v. Warley, 245 U.S. 60 (1917) 8

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 5, 15, 18-19, 21-23

Coalition for Economic Equity v. Wilson,
122 F.3d 692 (9th Cir. 1997) 22-23

DeFunis v. Odegaard, 416 U.S. 312 (1974) 5

Dred Scott v. Sanford, 60 U.S.
(19 How.) 393 (1856) 6, 18

Firefighters v. Cleveland, 478 U.S. 501 (1986) 16

Fullilove v. Klutznick, 448 U.S. 448 (1980) 5, 18-19

TABLE OF AUTHORITIES—Continued

Page

Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) 11

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 10, 13

Hi-Voltage Wire Works, Inc. v. City of San Jose,
12 P.3d 1068 (Cal. 2000) ..... passim

Hughes v. Superior Court of California,
339 U.S. 460 (1950) 8, 14

International Brotherhood of Teamsters v. U. S.,
431 U.S. 324 (1977) 14

Loving v. Virginia, 388 U.S. 1 (1967) 8

Lutheran Church-Missouri Synod v. Federal Communications Commission,
141 F.3d 344 (D.C. Cir. 1998) 20-21

McDonald v. Santa Fe Trail Transportation Co.,
427 U.S. 273 (1976) 10, 13

Peterson v. Greenville, 373 U.S. 224 (1963) 8

Plessy v. Ferguson, 163 U.S. 537 (1896) 6-7, 18

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 1, 6, 10, 14-15, 17

Reitman v. Mulkey, 387 U.S. 369 (1967) 8

Rice v. Cayetano, 528 U.S. 495 (2000) 2

Shaw v. Reno, 509 U.S. 630 (1993) 2

Sheet Metal Workers v. EEOC,
478 U.S. 421 (1986) 14, 16

Shelley v. Kraemer, 334 U.S. 1 (1948) 8

TABLE OF AUTHORITIES—Continued

Page

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 2

Steelworkers v. Weber, 443 U.S. 193 (1979) ... 12-14, 17-18

United States v. Paradise, 480 U.S. 149 (1987) 15

Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999) 21

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 22

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 15

Statutes

15 U.S.C. § 637(a) 2

§ 637(a)(5) 3

§ 637(a)(6)(A) 3

§ 637(d) 2

§ 637(d)(1) 3

§ 644(g) 2

Intermodal Surface Transportation Efficiency Act of 1991, section 1003(b), Pub. L. No. 102-240, 105 Stat. 1914 (1991) 2

Public Works Employment Act of 1977, section 103(f)(2), Pub. L. No. 95-28 19

TABLE OF AUTHORITIES—Continued

Page

Small Business Act of 1958, § 8(a) 2

§ 8(d) 2

§ 8(d)(i) 3

§ 502 2

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987) 2

Transportation Equity Act for the 21st Century of 1998, section 1101(b), Pub. L. No. 105-178, 112 Stat. 107 (1998) 2

Constitutions

Cal. Const. art. I, § 31 1

Rules

U.S. Supreme Court Rule 37 1

Rule 37.6 1

Miscellaneous

Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979) 7

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, American Civil Rights Institute, and Center for Equal Opportunity respectfully submit this brief amicus curiae in support of Petitioner Adarand Constructors, Inc. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California, or the purposes of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF considers this case to be of special significance in that it concerns government's proper role in enacting race preferences.

The American Civil Rights Institute (ACRI) is a national civil rights organization, based in Sacramento, California, created to educate the public about the problems created by governmental race and sex preferences. ACRI's initial focus was on monitoring the implementation of the California Civil Rights Initiative, which was added to the California Constitution as Article I, Section 31 when the voters approved Proposition 209. ACRI's chairman is Ward Connerly, who was the Chairman of the Yes-on-209 campaign in the California

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[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

1996 general election and was a signatory of the argument appearing in the ballot pamphlet in favor of that initiative.

The Center for Equal Opportunity (CEO) is a District of Columbia nonprofit corporation. CEO's main purpose is to study issues concerning race and ethnicity. CEO has participated actively in a wide variety of civil rights cases including: *Alexander v. Sandoval*, 149 L. Ed. 2d 517 (2001); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

STATEMENT OF THE CASE

This Court granted certiorari to determine the following questions.

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

As noted by the Tenth Circuit, the statutory framework of the Department of Transportation's current Disadvantaged Business Enterprise (DBE) program is formed by sections 8(a), 8(d), and 502 of the Small Business Act of 1958, as amended, (SBA), 15 U.S.C. §§ 637(a), (d), and 644(g); the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987); section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914, 1919-21 (1991); section 1101(b) of the Transportation Equity Act for the 21st Century of 1998 (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, 113-15 (1998), and their accompanying

regulations. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1158 (10th Cir. 2000).

Section 8(d)(1) of the SBA declares it to be "the policy of the United States that . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1). The SBA defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically disadvantaged individuals" are defined by the SBA as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). *Adarand*, 228 F.3d at 1160.

As found by the court below, *id.* at 1160-61:

> STURAA, ISTEA and TEA-21, the transportation appropriations statutes at issue in this case incorporate the presumption of disadvantage from SBA § 8(d). See STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B); TEA-21 § 1101(b)(2)(B) (providing that the term "socially and economically disadvantaged individuals" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto.") STURAA, ISTEA, and TEA-21 all set forth aspirational goals of 10% DBE participation in federal subcontracting. See STURAA § 106(c)(1); ISTEA § 1003(b)(1); TEA-21 § 1101(b)(1).

The question before this Court is whether Congress had a compelling interest to enact this type of race preference

legislation and, if so, whether these race-based preferences are narrowly tailored to serve that interest.

SUMMARY OF ARGUMENT

The analysis of civil rights law set forth in *Hi-Voltage Wire Works, Inc. v. City of San Jose* shows that the proper interpretation of equal protection law is one that prohibits government from benefiting or burdening individuals on the basis of race. The federal highway construction statutes fail this test in granting preferences to members of some minority groups solely on the basis of their race. In enacting the race preferences at issue, Congress has failed to make findings identifying specific discrimination and therefore has been unable to create narrowly tailored remedial programs which compensate actual victims of race discrimination. This defect violates the equal protection component of the Fifth Amendment.

INTRODUCTION

The only conceivable rationale available for racial preferences in the contracting context is remedial-stopping discrimination and making whole its past victims. But in 2001, there will never be an instance where such discrimination can pass strict scrutiny, because there will always be a better approach to remedying any discrimination than granting preferences based on race. Bidding generally has been and always can be structured so that the low bidder will know if he was discriminated against. Nor are preferences needed as a prophylactic measure to head off discrimination, since the government can require publication and wide circulation of contracting opportunities. Moreover, the systemic, formal racial discrimination that might have justified blanket racial classifications is, happily, now a thing of the past in the contracting area. Instead, many governments are under political pressure to discriminate in favor of some minorities. Even if there could still, in theory, be a few cases of discrimination that

go unremedied in the absence of racial classifications, there will be many more cases of discrimination that will result from the institutionalization of racial preferences. This Court gave some leeway to government actors in its *Adarand* and *Croson* decisions, but now it is being taken advantage of. Consider this very case, where the federal executive branch, State of Colorado, and court of appeals all have failed to make a good faith attempt to follow this Court's 1995 decision. Instead, they have exploited the fact that the Court left the door slightly ajar and have driven a truck through it. The time has come to shut that door.

ARGUMENT

I

THE HISTORY OF CIVIL RIGHTS LITIGATION DEMONSTRATES THAT THE EQUAL PROTECTION COMPONENT OF THE CONSTITUTION SHOULD BE INTERPRETED TO PROHIBIT BOTH RACE-BASED PREFERENCES AND DISCRIMINATION

A useful primer on the changing state of civil rights law is set out in the recent decision of the California Supreme Court in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). In holding that a city's race and sex preferences in public contracting violated the state constitution, the court provided an in-depth review of this Court's analysis of civil rights. As the California court found: "In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race." *Id.* at 541 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring), and *DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting)).

A. The Initial Promise of Equality Betrayed by *Dred Scott* and *Plessy*

Citing the Declaration of Independence, the California court noted that while our nation was founded on the principle that "all men are created equal," "our history reflects a continuing struggle to enable every individual to fully realize this 'self-evident' article of faith." (Citing *Regents of the University of California v. Bakke*, 438 U.S. at 387-95 (Marshal, J., concurring and dissenting).) *Hi-Voltage*, 12 P.3d at 1072.

The California court found that while the courts have often served to effect positive change in the quest for equality, their articulation of a coherent vision of the civil rights guaranteed by our Constitution has had its low points. "The nadir was perhaps the *Dred Scott* decision, in which the United States Supreme Court denied citizen status to African-Americans, 'whether emancipated or not.'" *Hi-Voltage*, 12 P.3d at 1073 (citing *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 405 (1856)).

After the Civil War, Congress overturned the *Dred Scott* decision through its adoption of the Fourteenth Amendment expressly defining citizenship and forbidding any state from "denying to any person within its jurisdiction the equal protection of the laws." Yet, in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), this Court upheld state-initiated race restrictions and approved legally enforced segregation on a "separate but equal" rationale. *Hi-Voltage*, 12 P.3d at 1073.

> Although speaking only for himself at the time, Justice Harlan vigorously dissented: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."

Hi-Voltage, 12 P.3d at 1073 (citing *Plessy*, 163 U.S. at 559-60 (Harlan, J., dissenting)).

B. *Brown* Seeks To Remove the Use of Race from Government Decisionmaking

Justice Harlan's vision of color-blind equality before the law would not prevail until *Brown v. Board of Education*, 347 U.S. 483 (1954), 58 years later. In *Brown*, this Court repudiated *Plessy* and "acknowledged the invidious effect of separating individuals solely because of their race. 'The impact is greater when it has the sanction of the law. . . .'" *Hi-Voltage*, 12 P.3d at 1073 (quoting *Brown*, 347 U.S. at 494).

As *Hi-Voltage* found, while *Brown* concerned state-imposed segregation in education, the courts did not hesitate to apply its principle in other contexts. *Hi-Voltage*, 12 P.3d at 1073 (citing Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775, 783 n.24 (1979)).

> In summarizing the common thread of these cases, Professor Van Alstyne observed that in the years between 1955 and 1976 following *Brown v. Board of Education*, "virtually every other race-related decision by the Supreme Court . . . 'removed the race line from our governmental systems.'" (Van Alstyne, *supra*, 46 U.Chi L.Rev. at p. 783.) "To the reasonably discerning, this appeared true even in instances involving highly controversial judicial decrees that paired racially identifiable schools, redrafted attendance lines, or mandated busing. In each instance, the fulcrum of judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove. The object was thus to disestablish particular, existing

uses of race, not to establish new ones." (*Id.* at pp. 783-784, fn. omitted).

Hi-Voltage, 12 P.3d at 1073-74 (emphasis by the court).

Hi-Voltage found that *Brown* served as a landmark in this Court's active development of a "color-blind" jurisprudence. The California court, *id.*, cited *Hughes v. Superior Court of California,* 339 U.S. 460 (1950), which upheld an injunction against picketers seeking to have a supermarket hire African-American grocery clerks proportionate to the number of African-American customers at that store. This Court ruled "that it would encourage discriminatory hiring to give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system." *Id.* at 463.

Hi-Voltage further relied on *Peterson v. Greenville*, 373 U.S. 224 (1963), in which this Court struck down a city ordinance requiring restaurant and hotel proprietors to maintain segregated facilities. When a state "passes a law compelling persons to discriminate against other persons because of race," it commits "a palpable violation of the Fourteenth Amendment." *Id.* at 248. *Hi-Voltage* also cited *Reitman v. Mulkey*, 387 U.S. 369 (1967), concerning a state constitutional amendment that, while facially neutral, encouraged and facilitated racial discrimination in the rental and sale of residential property. "As in analogous decisions, the state had violated the right of equal protection because it 'had taken affirmative action designed to make private discriminations legally possible.' *Id.* at 375." *Hi-Voltage*, 12 P.3d at 1074.

Hi-Voltage also cited *Loving v. Virginia*, 388 U.S. 1, 10 (1967), striking down a state ban on interracial marriage; *Anderson v. Martin*, 375 U.S. 399, 402 (1964), invalidating a state statute requiring designation of candidates' race on electoral ballots; *Shelley v. Kraemer*, 334 U.S. 1 (1948), prohibiting a state court's enforcement of restrictive covenants; and *Buchanan v. Warley*, 245 U.S. 60 (1917), invalidating a

statute forbidding blacks and whites from moving into a block where the greater number of residences were occupied by persons of the other race. *Hi-Voltage*, 12 P.3d at 1074 n.5. As the California court observed:

> Professor Alexander Bickel referred to these cases as "the great decisions of the Supreme Court" whose lesson "and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." (Bickel, *The Morality of Consent* (1975) p. 133 (Bickel).) For Professor Van Alstyne, "the message is commendably even stronger. Laws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. And laws attempting to advance either policy even in disguise will likewise be struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers." (Van Alstyne, *supra,* 46 U.Chi. L.Rev. at p. 792, fn. omitted.)

Hi-Voltage, 12 P.3d at 1074-75.

C. The Civil Rights Act of 1964 Enacted To Prohibit Discriminatory Preference

Although this Court had rejected the principle of separate but equal and had directed the admission of students to public schools "on a racially nondiscriminatory basis with all deliberate speed," *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), many officials charged with implementing the mandate were "reluctant if not recalcitrant" to perform their duty. *Hi-Voltage*, 12 P.3d at 1075. Congress enacted the Civil Rights Act of 1964 in response. "As the floor debates and committee reports attest, Congress intended that the Act reflect

Justice Harlan's understanding of the Constitution and "be 'colorblind' in its application." *Hi-Voltage*, 12 P.3d at 1075 (quoting *Bakke*, 438 U.S. at 415 (Stevens, J., concurring and dissenting)).

Title VII of the Civil Rights Act forbids, with limited exceptions, discrimination in employment on the basis of race, color, religion, sex, or national origin. This Court construed Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). African-American workers claimed a racially neutral hiring and promotion criterion unrelated to any job requirement discriminated against them in its actual effect. This Court agreed in a unanimous opinion: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . . ." *Id.* at 429. To that end, the Act prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. Nevertheless, this Court stressed: "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications . . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.* at 430-31. *Hi-Voltage*, 12 P.3d at 1075.

Subsequently, this Court made clear in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-79 (1976), "Title VII . . . prohibits the discharge of 'any individual' because of 'such individual's race.' Its terms are not limited to discrimination against members of any particular race." . . . "This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' and create an 'obligation not to discriminate against whites.'" *Id.* at 280. Accordingly, regardless of the complainant's race, the "same standards" prohibiting employment discrimination applied. *Id.* *Hi-Voltage*, 12 P.3d at 1076 (citations omitted).

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), this Court cautioned that "Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579. *Hi-Voltage*, 12 P.3d at 1076.

From these cases the California court found:

> The Supreme Court's early interpretation of Title VII emphasized several factors: The purpose of Title VII was to ensure equal opportunity for all. Thus, discriminatory practices were forbidden irrespective of the victim's race. Relief could take the form of restitution to individual victims, including those establishing that an employer's pattern and practice of discrimination deterred their applications for employment. It could also be remedial to eradicate the effects of specific discriminatory practices, but courts had no obligation or authority to require any particular affirmative hiring or other employment practices. In other words, consistent with congressional intent, the court's construction confirmed and reinforced the role of government as color-blind in these matters.

Hi-Voltage, 12 P.3d at 1076.

D. Civil Rights Jurisprudence Reverts To Authorizing Race Preferences

The California court found that the analytical framework of Title VII jurisprudence was substantially modified in 1979 by *Steelworkers v. Weber*, 443 U.S. 193 (1979). There this Court upheld an employer's voluntarily initiated training program intended to eliminate a conspicuous racial imbalance in its craftworkers by providing that at least half of the trainees chosen be African-Americans "until the percentage of black skilled craftworkers in the . . . plant approximated the percentage of blacks in the local labor force." *Id.* at 199. A majority of the court found that "[e]xamination of [the legislative history of Title VII and the historical context from which the Act arose] makes clear that an interpretation . . . that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." *Id.* at 201-02. Because "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy,'" *id.* at 202, and "private and voluntary affirmative action efforts [was] one method of solving this problem," *id.* at 203, Congress could not have meant to ban them absolutely. *Id.* at 206. *Hi-Voltage*, 12 P.3d at 1076-77.

The California court observed that in concurring, Justice Blackmun found the court's expansive approach

> somewhat disturbing for me because, as Mr. Justice Rehnquist points out, the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates 'arguable violations,' discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted." (*Weber*, supra, 443 U.S. 193, 212-213 (conc. opn. of Blackmun, J.).) Justice Blackmun also expressed concern that under the majority's rule, "the individual employer need not have engaged in discriminatory practices in the past." (*Id.* at p. 213).

Hi-Voltage, 12 P.3d at 1077.

Both Chief Justice Burger and then-Justice Rehnquist dissented. The Chief Justice criticized the majority's apparent reversal of settled law: "Until today, I had thought the Court was of the unanimous view that 'discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed' in Title VII." *Weber*, 443 U.S. at 218 (Burger, C.J., dissenting) (quoting *Griggs*, 401 U.S. at 431). In his view, the legislative history established that the Civil Rights Act "was conceived and enacted to make discrimination against *any* individual illegal, and I fail to see how 'voluntary compliance' with the no-discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others." *Weber*, 443 U.S. at 218. *Hi-Voltage*, 12 P.3d at 1077.

Justice Rehnquist's dissent recounted the numerous cases in which the Court had "never wavered in our understanding that Title VII 'prohibits *all* racial discrimination in employment, without exception for any group of particular employees.' " *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting) (quoting *McDonald*, 427 U.S. at 283). He also exhaustively analyzed extensive portions of Title VII's legislative history supporting that understanding. *Weber*, 443 U.S. at 226-54. For example, "Senator Humphrey [one of the bipartisan floor managers of the entire civil rights bill in the Senate] . . . stated that 'nothing in

the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.' " *Id.* at 237 (footnote omitted). Senator Kuchel, the other bipartisan floor manager, explained: "'Employers and labor organizations could not discriminate *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind.' [Citation.]" *Id.* at 238. As its proponents emphasized, the Act " 'provides no preferential treatment for any group of citizens. In fact, it specifically prohibits such treatment.' " *Id.* at 248 (footnote and citations omitted). *Hi-Voltage*, 12 P.3d at 1077-78.

The California court found that in the wake of *Weber*, Title VII jurisprudence underwent a sea change in less than a decade from providing individualized restitutionary relief for specific injury to approving race-conscious practices by court order or employer-initiated programs. (Comparing *International Brotherhood of Teamsters v. U. S.*, 431 U.S. 324, 342-43 n.24, 346-47, 356-62, 374-75 n.61 (1977), with *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 445 (1986).) *Hi-Voltage*, 12 P.3d at 1078. "Having once validated consideration of race, the United States Supreme Court struggled to articulate a principled, consistent standard for doing so given its earlier construction of Title VII. (*See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212-31 (1995) [reflecting similar difficulty developing coherent principles for consistently resolving equal protection challenges to race-based actions])." *Hi-Voltage*, 12 P.3d at 1078 (footnote omitted).

Hi-Voltage found that a comparable evolution occurred in decisions involving equal protection challenges. "Setting aside such holdings as *Hughes v. Superior Court of California*, 339 U.S. 460, and *Brown v. Board of Education*, 347 U.S. 483, five members of the Supreme Court in *Bakke*, 438 U.S. 265, expressed the view that the Constitution will tolerate race-based state action intended to remedy the effects of past

discrimination even on behalf of individuals who did not personally suffer as a result." *Hi-Voltage*, 12 P.3d at 1078 (citing *Bakke*, 438 U.S. at 316-19 (Powell, J.) *id.* at 324-26 and n.1 (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.)).

Hi-Voltage found that in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986), this Court "accepted the licitness of race-conscious remedies with the caveat 'a public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.'" *Id.* at 277. *Hi-Voltage*, 12 P.3d at 1078 n.9. Similarly, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236-37 (allowing federal agencies to use a "narrowly tailored race-based remedy" in response to "lingering effects of racial discrimination against minority groups"), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (finding that "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors [could give rise to] an inference of discriminatory exclusion"), justified taking affirmative action to rectify the effects. *Hi-Voltage*, 12 P.3d at 1078 n.9. The California court also cited *United States v. Paradise*, 480 U.S. 149, 177 (1987), in which this Court

> expressly approved a judicial decree that included a racial quota for future promotions by the Alabama Department of Public Safety. Because the order was narrowly tailored to redress "pervasive, systematic, and obstinate discriminatory conduct of the Department" (*id.* at p. 167), it did not offend equal protection even though none of the beneficiaries had experienced promotional discrimination.

Hi-Voltage, 12 P.3d at 1078 n.9.

Similarly, in *Sheet Metal Workers*, 478 U.S. at 445, this Court held that Title VII "does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief [in the form of fixed union membership goals] as a remedy for past discrimination" even if it may benefit individuals who were not identified victims of such discrimination. And in *Firefighters v. Cleveland*, 478 U.S. 501 (1986), this Court ruled that a consent decree requiring race-conscious promotions did not violate Title VII even though beneficiaries had not suffered discrimination. In reaching this result, a plurality of the court construed Title VII not only to guarantee equal employment opportunities but to "foster" them as well. *Sheet Metal Workers*, 478 U.S. at 448. But Justice O'Connor observed that "the plurality offers little guidance as to what separates an impermissible quota from a permissible goal." 478 U.S. at 494 (O'Connor, J., concurring and dissenting). *Hi-Voltage*, 12 P.3d at 1078-79.

The California court found that these later cases relied on a

> justification [that] replaced individual right of equal opportunity with proportional group representation. Although pursued for the purpose of eliminating invidious discrimination, history reveals that this prevailing social and political norm had its parallel in laws antedating the Civil Rights Act, when government could legally classify according to race. (See Van Alstyne, *supra,* 46 U. Chi. L.Rev. at 797-803.)

Hi-Voltage, 12 P.3d at 1079.

E. California Returns to Color-Blind Jurisprudence

Hi-Voltage noted that the argument in favor of the 1996 California Civil Rights Initiative stated in part: "A generation ago, we did it right. We passed civil rights laws to prohibit

discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides." *Hi-Voltage*, 12 P.3d at 1082. The California Supreme Court found that in adopting Proposition 209 the people of California intended to put back into place the historic "Civil Rights Act and equal protection that predated" *Weber*, 443 U.S. 193, and *Bakke*, 438 U.S. 265. That is "an interpretation reflecting the philosophy that 'however it is rationalized, a preference to any group constitutes inherent inequality. Moreover, preferences for any purpose are anathema to the very process of democracy.' " *Hi-Voltage*, 12 P.3d at 1083.

> [T]hose who supported and enacted "the historic Civil Rights Act" sought to ensure equal opportunity for all and eliminate race and sex from decisionmaking in employment and other areas. By 1996, however, judicial construction of both the Act and the equal protection clause had engrafted a series of qualifications permitting race- and sex-conscious programs formulated to remediate the lingering effects of past discrimination or conspicuous imbalance in the work force. . . . [T]he voters intended . . . essentially a repudiation of the decisional authority that permitted such discrimination and preferential treatment notwithstanding antecedent statutory and constitutional law to the contrary.

Hi-Voltage, 12 P.3d at 1086-87.

Amici submit that the California court's interpretation of civil rights law is the proper one. The meaning and intent of equal protection, whether in that state's constitution, the Fourteenth Amendment, or the Fifth Amendment, is one that prohibits both discrimination and preferences on the basis of race. The periods of deviation from that principle, whether in

Dred Scott and *Plessy* or in *Weber* and *Fullilove*, are unfortunate aberrations based on ill-considered goals. Amici urge this Court to return the nation to the true concept of equal protection in which no individual is burdened or benefited on the basis of race.

II

THE STATUTORY RACE PREFERENCES FAIL THE *CROSON* TEST

A. The Statutes' Findings Fail the *Croson* Mandate To Identify Specific Discrimination

This Court held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 493, that the strict scrutiny test is necessary to ensure that the remedy chosen fits the legislative body's "compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." The Court then spelled out the rationale for this requirement:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.").

Id. at 493-94 (citation omitted).

Croson held that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" *Id.* at 498. Yet the federal government has enforced a race preference program at least since the enactment of the

Public Works Employment Act of 1977, Pub. L. No. 95-28, § 103(f)(2), providing that 10% of each grant shall be expended for Minority Business Enterprises. *See Fullilove*. There has been "no logical stopping point" to these race-preference programs and unless this Court acts none is foreseen.

Justice Kennedy's conclusion in *Croson*, 488 U.S. at 519-20, applies directly to the federal race-preference programs:

> The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

Because the federal program utterly fails to meet this standard, it is not a remedy but a preference and is forbidden by the equal protection component of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

B. The Federal Race-Preference Program Is Not Remedial but Merely Seeks Racially Proportional Participation

Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C. Cir. 1998), was a Fifth Amendment Equal Protection challenge to the Federal Communications Commission's (FCC) "equal employment opportunity (EEO)," *id.* at 346, programs imposed on radio broadcasters. The court found that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated." *Id.* at 351. However, the court found that the EEO regulations extended beyond outreach efforts to influence ultimate hiring decisions.

> The crucial point is not, as the [government] argue[s], whether they require hiring in accordance with fixed quotas; rather, it is whether they oblige stations to grant some degree of preference to minorities in hiring. We think the regulations do just that. The entire scheme is built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation.

Id. at 351-52.

> As here, the government insisted that its program should be regarded as if it did no more, or not significantly more, than seek non-discriminatory treatment of women and minorities. That argument . . . presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition.

Id. at 352.

This "dubious proposition," of course, is the whole basis of the statutory race-preference program here at issue. The circuit court in *Lutheran Church* held: "It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals." *Id.* at 353. *Lutheran Church* therefore held the FCC regulations to be unconstitutional. *Id.* at 356.

C. The Chosen Remedy of Preference Lacks Any Nexus To, and Does Nothing To Correct, the Purported Violation

Adarand emphasized: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." 515 U.S. at 229. This passage was quoted by the Fifth Circuit in *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999), which found: "This means that a race-conscious remedy must be framed to address the exact effects and harms of the discrimination at issue." *Id.*

Croson stated that if government had evidence that nonminority contractors were systematically excluding minorities, then government "could act to dismantle the closed business system by taking appropriate measures *against those who discriminate* on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509 (emphasis added and citations omitted).

This passage makes clear that federal agencies' duty is to act against the actual practitioners of discrimination, not merely strike out blindly against the entire class of construction contractors. As a last resort, only "in the extreme case" may the government craft some form of narrowly tailored race preference. Here, the government enforces its race and sex preferences not in extreme cases and as a last resort but in *all*

cases and as a first resort. The preference is tailored to nothing other than race balancing; there is no attempt to address and correct any actual instances of race discrimination.

D. The Race-Preference Statutes Make No Attempt To Restrict Their Benefits To Victims of Past Discrimination

The courts have strongly suggested that race-conscious relief should be targeted to actual victims of discrimination. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), held that when "a state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference 'on the basis of their race' but on the basis that they have been individually wronged." *Id.* at 700 n.7.

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), overturned a Boston public school's race-conscious policy in part because of its lack of victim-specificity. The court found, "there is no reason to assume that granting a remedy to one member of a particular race or ethnic group comprises a condign remedy for harm done to another, especially when those who have been harmed are easily identifiable and still within the institution that allegedly suffers from the vestiges of past discrimination." *Id.* at 808 (citation omitted).

By the same token, there is no reason to assume that the federal program of granting of preferences to one DBE is an appropriate remedy for harm done to another DBE, especially since any victims of actual discrimination in federal contracting could easily be invited to come forward and be recompensed by the wrongdoer, whether state or local agency or prime contractor. *Croson* held that "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." 488 U.S. at 508. *Croson* further taught that the

desire to increase the representation of minorities, "standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake.'" *Id.* at 496.

CONCLUSION

The key factor ignored by the defenders of preference for race-based groups is "the principle that the Fourteenth Amendment guarantees equal protection to individuals and not to groups." *Coalition*, 122 F.3d at 704. The Equal Protection component of the Fifth Amendment extends this guarantee to the actions by the federal government. *Bolling v. Sharpe*, 347 U.S. at 499. The federal program of group preference in derogation of individual rights violates this constitutional command. For the reasons set forth herein, the decision of the Tenth Circuit should be reversed.

DATED: June, 2001.

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In The
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Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. *AMICUS CURIAE* ON BEHALF OF PETITIONER

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Interest of the Amicus Curiae 1

Statement of the Case..... 2

Summary of Argument..... 2

Argument 3

I. The Government's Interest Is Not Sufficiently Compelling To Permit A Program Of Numerical Proportionality..... 3

II. The Government's Evidence of Compelling Interest Was Not Materially Different From That In *Croson* And *Fullilove*..... 10

Conclusion 15

TABLE OF AUTHORITIES

CASES — Page

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) (*Adarand III*) 2, 6

Adarand Constructors, Inc. v. Slater,
228 F.3d 1147 (10th Cir. 2000)..... *passim*

City of Richmond v. J. A. Croson Co.,
488 U.S. 469 (1989)..... *passim*

Fullilove v. Klutznick, 448 U.S. 448
(1980)..... *passim*

International Salt Co. v. United States,
332 U.S. 392 (1947)..... 9

Metal Workers v. EEOC,
478 U.S. 412 (1986)..... 8

National Society of Professional Engineers
v. United States, 435 U.S. 679 (1978)..... 9

Shaw v. Hunt, 517 U.S. 899 (1996) 3, 7, 8

Swann v. Charlotte-Mecklenberg
Board of Education, 402 U.S. 1 (1971) 8

Teachers v. Hudson, 475 U.S. 292 (1986)..... 5, 9

United Jewish Organizations v. Carey,
430 U.S. 144 (1977)..... 2

United States v. Paradise,
480 U.S. 149 (1987)..... 5, 9

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986)..... 10

STATUTES

Public Works Employment Act,
91 Stat. 117 (1977)..... 15

Small Business Act, § 8(d)(1), 15 U.S.C.
§ 637(d)(1) 4, 10

OTHER

Minority Enterprises and Allied Problems
of Small Businesses H.R. Rep. No. 94-1791
(1977), H.R. Rep. No. 94-468 (1975) 14

Appendix - The Compelling Interest For
Affirmative Action in Federal Procurement,
61 Fed. Reg. 26,060 (1996)..... 15

INTEREST OF THE AMICUS CURIAE [1]

Amicus Curiae, the Southeastern Legal Foundation, Inc., is a non-profit public interest organization that shares an interest in the proper construction and enforcement of the laws and the Constitution of the United States. The Southeastern Legal Foundation was established in Georgia for the purpose of participating in the public policy process. In addition to legislative initiatives and promulgation of programs designed to inform and educate the public, the organization endeavors to influence public policy through litigation.

The *amicus* opposes the institutionalization of racism in America that results from race based preferences. The *amicus* believes that, as Justice Stevens wrote, "a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race [and] can only exacerbate rather than reduce racial prejudice." *Fullilove v. Klutznick*, 448 U.S. 448, 545, (1980) (Stevens, J., dissenting). In other words, as Justice Brennan wrote, "preferential treatment may act to stigmatize its recipient groups, for although intended to

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

correct systemic or institutional inequities, such a policy may imply to some of the recipients' inferiority and especial need for protection." *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-74, (1977) (Brennan, J., concurring in part). Instead, as Justice Scalia wrote in this very case, "under our Constitution there can be no such thing as either a creditor or debtor race[;] That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based upon race, or based upon blood." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (*Adarand III*).

The *amicus* therefore supports the Petitioner in opposing the use of skin color to exclude certain individuals from public contracting. The important public policy questions that such exclusions raise, and that form the basis of the *amicus* interest in this case, relate to equal protection under the laws.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The evidence in this case in support of a compelling interest sufficient to warrant the adoption of a program of numerical proportionality is not qualitatively significant from that before the Court in *Croson* and *Fullilove*. Therefore, the issue of congruence under the Fourteenth and Fifth Amendments is crisply presented. The case is not appropriate for decision based on differences in the respective records.

Imposition of a remedy of numerical proportionality on the community at large is not an

appropriate response in the absence of identified discrimination by actors or against victims.

Government cannot continue to impose race-based numerical quotas to account for amorphous societal disadvantage that is as better ascribed to socio-economic status than race. In the absence of a discriminator and a victim, no remedy can ever be just.

Remedies which are so ageless in the past as to be based in any part on Richmond, Virginia's role as the capital of the Confederacy, as in Justice Blackmun's dissent in *Croson*, or as timeless in the future as the essentially similar "temporary" programs at issue in *Fullilove* enacted in 1977, should now be removed from consideration by all governmental agencies.

ARGUMENT

I.

The Government's Interest Is Not Sufficiently Compelling To Permit A Program of Numerical Proportionality.

The Court of Appeals cited *Croson* and *Shaw v. Hunt*, 517 U.S. 899, 909 (1996), for the proposition that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." App. at 25, citing *Croson*, 488 U.S. at 498-506 (O'Connor, J.) [2]

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[2] Justice O'Connor's opinion in *Croson* does not contain the language quoted from *Shaw*.

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the Subcontractor Compensation Clause ("SCC"):

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality" and found that numerical proportionality requirements based on race in Federal contracts are appropriate as "aspirational goals." App. at 65.

The *amicus* submits that it is not a permissible remedial purpose to create a system of race-based preferences designed to achieve participation to the maximum practicable extent by race-designated companies in Federal contracting.

The Court of Appeals concluded that this was such a case in which a race-conscious remedy was appropriate. The stated reason was that:

> "the programs before us impose a significantly more flexible and less intrusive remedy—a voluntary subsidy as opposed to a fixed set-aside subject to waiver."

App. at 20. Implicit in the Tenth Circuit's opinion and "The Compelling Interest" is the idea that if <u>any</u> race-conscious action is appropriate a program of numerical proportionality is appropriate.

Such a conclusion is erroneous for two reasons. First, it is not factually correct. In *Adarand*, the contractor, Mountain Gravel & Construction, was obligated by contract to achieve the prescribed goal, was subject to penalty if he did not, and merely chose to be compensated under the SCC because the contract met the requirements for the financial assistance.

The second reason that a race-conscious remedy is inappropriate here is that the evidence in this case, like that in *Croson* and *Fullilove*, fails to identify the discrimination with the necessary particularity. The record reflects societal discrimination and generalized assertions of discrimination. Thus the compelling interest in lacking.

Adarand makes a compelling argument that the government has not identified discrimination with the specificity that justifies any race-based remedy. The necessity for any race-based "remedy" in this case is far less specifically identified than the hiring criteria approved in *United States v. Paradise,*[1] 480 U.S. 149 (1987) and reaffirmed in *Adarand III*, 515 U.S. 200, 237.

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[1] *Paradise* involved a judicial remedy imposed on an offender, not a legislative enactment imposing a racial preference on the community at large. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large. *Teachers v. Hudson*, 475 U.S. 292, 309-10 n. 22 (1986).

However, from the conclusion that some sort of race-conscious remedy might be permissible, it is a larger leap to justify the type of proportional representation approved by the Court of Appeals in this case. As this Court stated in *Adarand III*:

> But we agree with Justice Stevens that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, supra, at 533-535, 537. We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means.

515 U.S. at 236.

As Justice O'Connor noted in *Croson*:

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings" sufficient to

> ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry. Supp. App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant*, supra, at 275, 106 S.Ct., at 1847 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

488 U.S. at 498.

As the Chief Justice stated in *Shaw v. Hunt*, supra:

> A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. *Croson*, 488 U.S. at 498-506. For that interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be "'identified discrimination.'" Id., at 499, 500, 505, 507, 509. "While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Id., at 504.

> A generalized assertion of past discrimination in a particular industry or region is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Id., at 498. (opinion of O'Connor, J.).

517 U.S. at 909.

Cases involving race-conscious distinctions in various contexts have been approved. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987)(hiring goal); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971)(school desegregation); *Metal Workers v. EEOC*, 478 U.S. 412 (1986). Each of these cases involved a remedy imposed on a violator and to the benefit of a victim.

There are clear distinctions between the race-conscious remedies which have been approved and programs of numerical proportionality.

The hiring goal remedy in *Paradise* was described as "temporary," and applied only if the governmental body failed to provide a promotion procedure that does not have an adverse impact on minorities. Id., 480 U.S. at 184.

A key distinction between the remedies in the employment and desegregation cases arises when the remedy is imposed on an offender rather than the public.

> A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief

> exceed the bounds of "reasonableness." The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L. Ed. 2d 260 (1986), and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L. Ed. 2d 902 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution.

Paradise, 480 U.S. at 192 (Stephens, J., Concurring), citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-698 (1978). See also *International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947); *Teachers v. Hudson*, 475 U.S. 292, 309-310, n. 22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large")(citations omitted).

The legislative enactment is a race-conscious preference without a particularized finding of discrimination.

This is improper where "in the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson*

Board of Education, 476 U.S. 267, 276 (1986). (opinion of O'Connor, J.).

B.

The Government's Evidence Of Compelling Interest Was Not Materially Different From That In *Croson* And *Fullilove*

The evidence introduced in support of the government's compelling interest in this case was essentially the same as that presented in *Fullilove* and *Croson*. There is no qualitative difference in any of the records. In each case, there was evidence that minority-owned firms faced difficulties in competing for government contracts because of societal forces. In each case the governmental body concluded that the difficulties were the result of discrimination. The result was the same in each case: promulgation of a program designed to provide contracting opportunity proportional to the availability of minority firms.

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the subcontractor compensation clause:

> The [SBA]...declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality." App. at 65.

The quantity of paperwork cited by the government was probably greater in this case. Qualitatively, that is analogous to loudly repeating the same point to the speaker of a foreign language.

The record in the Court of Appeals consisted of statistical evidence of the following:

1. The tendency of company owners to pass ownership of their companies to members of their families instead of members of minority groups, App. at 34-35;

2. The difficulty people with no experience have in joining a union in order to gain the experience needed to compete with established non-minority companies, App. at 35.

3. The difficulty of obtaining access to capital in the absence of a credit history or collateral, App. At 35.

4. The tendency of prime contractors to work with subcontractors they already trust because they have worked with those subcontractors before, App. at 39-40;

5. "Bid shopping," a practice by which prime contractors allow trusted

former subcontractors to see and beat any lower bid from new, untested firms trying to replace those former subcontractors before, App. at 40;

6. The inability of new enterprises to obtain bonding because they lack experience, which in turn hampers their ability to gain experience, App. at 41-43; and

7. The inability of new market entrants to receive special pricing arrangements from suppliers from whom they have never purchased anything before, App. at 43-44.

Similarly, in *Croson*, the record consisted of the following evidence:

1. The City of Richmond's history of public and private racial discrimination including serving as the Capital of the Confederacy in the Civil War. 488 U.S. at 529, (Marshall, J. Dissenting).

2. Few, if any, minority members of trade associations. Id.

3. Receipt of few construction dollars by minority firms. Id.

4. Testimony that discrimination had been widespread in the local construction industry. Id.

5. Studies relied on in *Fullilove* to show discrimination in the construction industry. Id.

6. National discrimination. Id.

   a. Deficiencies in working capital. Id.

   b. Inability to meet bonding requirements. Id.

   c. Lack of a track record. Id.

   d. Lack of an awareness of bidding opportunities. Id.

   e. Unfamiliarity with bidding procedures. Id.

   f. Pre-selection of bidders. Id.

   g. Procurement officers using discretion to disfavor minority businesses. Id.

7. Remedial nature of program. Id., at 478 (O'Connor, J.)

8. To promote wider participation. Id., at 713 (O'Conner, J.)

Likewise, in *Fullilove* the identified factors were:

1. Need to provide a fair opportunity to participate. Id., 448 U.S. at 459.

2. Disparity between minority population and participation in dollars. Id., at 459.

3. Difficulty of minorities in understanding the bidding process. Id., at 461, 467.

4. Deficiencies in working capital of minority-owned firms. Id., at 467.

5. Inability of minority-owned firms to meet bonding requirements. Id.

6. Inadequate track record of minority-owned firms. Id.

7. Lack of awareness of bidding opportunity by minority-owned firms. Id.

8. Pre-selection of minority-owned firms. Id.

9. Exercise of discretion to disfavor minority-owned businesses. Id.

Finally, in *Fullilove*, the Congress had before it a report that presented the basis for the legislation, "Minority Enterprises and Allied Problems of Small Business, H.R. Rep. No. 94-1791 (1977) and an earlier version, H.R. Rep. No. 94-468 (1975). As in the present case, these reports functioned as a proxy for "The Compelling Interest" and the testimony and documentary production at the City Council hearing in *Croson*. See, Appendix – The Compelling Interest For Affirmative

Action in Federal Procurement, 61 Fed. Reg. 26,060 (1996).

In *Fullilove*, the 10% goal program, which had been adopted pursuant to the Public Works Employment Act of 1977, was described as "temporary." 448 U.S. at 547-48 (Stevens, J., dissenting) But as the history of the Federal programs reflected in the instant case demonstrates, amorphous standards applied to minority contracting will have no terminus when not firmly anchored in evidence of either a particular offender or an identifiable victim of discrimination. In the absence of evidence identifying a violator and a victim, race-conscious remedies serve only to perpetuate racial stereotyping and promote the very evil they purport to eradicate.

CONCLUSION

For the foregoing reasons, the SCC and the administration of the small business DBE program of the Small Business Act should be declared unconstitutional and enjoined.

The decision of the Court should bring finality to the use of programs of numerical proportionality in government programs as a remedy for discrimination.

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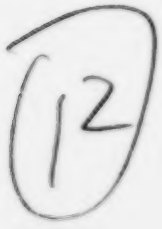

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of the Amicus Curiae 1

Statement of the Case 6

Summary of Argument 6

Argument 7

I. Numerical Proportionality Based On Race Is Not A Narrowly Tailored Remedy For Societal Discrimination 7

II. The SCC And The DBE Program Should Be Enjoined Both As To Women-Owned And Minority-Owned Disadvantaged Businesses. 17

Conclusion 19

TABLE OF AUTHORITIES

CASES — Page(s)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (Adarand III) ..... *passim*

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) (Adarand VI)..... 4

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ..... *passim*

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994).....15

Associated General Contractor v. Drabik, 214 F.3d 730 (6th Cir. 2000).....15

Carter v. Carter Coal Co., 298 U.S. 238 (1936).....18

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989)..... *passim*

Concrete Works v. City of Denver, 36 F.3d 1513 (10th Cir. 1994).....15

Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).....18

Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 893 F. Supp. 419, (E.D. Pa. 1995) 15

Fullilove v. Klutznick, 448 U.S. 448 (1980)..... *passim*

Hammon v. Barry, 813 F.2d 412 (DC Cir. 1987).....15

Long v. City of Saginaw, 911 F.2d 1192 (6th Cir. 1992).....15

Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).....15

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).....10

Teachers v. Hudson, 475 U.S. 292 (1986)..... 8

United States v. Paradise, 480 U.S. 149 (1987)..... 8

STATUTES

Small Business Act , § 8(d)(1), 15 USC § 637(d)(1).....8
15 USC § 644 (g) (1) 18
15 USC § 644(g)(1) 13
15 USC § 637(d)(3)(6).....9
15 USC § 2323(a)(1).....9

OTHER

U.S. General Accounting Office Report to Congressional Committees, August, 1994, "Highway Contracting, Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed". GAO/RCED-94-168 13

Appendix - The Compelling Interest For
Affirmative Action in Federal Procurement,
13 CFR § 26, App. E 11
13 CFR § 124.103(b) and (c) 9, 11
§ 124.104 11
49 CFR Part 26 12
49 CFR § 26.67 12
49 CFR § 26.33 ..... 13, 14
49 CFR § 26.67 13
61 Fed. Reg. 26060 (1996) 7, 10, 11
63 Fed. Reg.35, 726 (1998) 11

"The Small Business Administration's Priority
Business Development Program," Hearing Before
the Senate Commission on Small Business, 104th
Congress 42 (1995) 13

TEA-21 Regulations, 64 Fed. Reg. 5096 14

Transportation Equity Act for the 21st
Century, Pub.L. No. 105-178 (TEA-21) 14

INTEREST OF THE AMICUS CURIAE[1]

This brief is being filed on behalf of L. S. Lee, Inc. ("L. S. Lee"). L. S. Lee is a construction company doing business under its own name or related companies in New York, Delaware, Pennsylvania, Maryland, District of Columbia, Virginia, North Carolina and South Carolina. L. S. Lee is not owned by members of minority races or women who are eligible for certification as disadvantaged business enterprises (DBEs). The *amicus* does business as a contractor which installs guardrail and signs in the highway heavy construction industry and often offers to subcontract to general contractors on federally funded construction projects subject to DBE utilization programs.

States have generally obtained DBE participation through subcontracts let by prime contractors. The prime contractors are expected to meet the state DOT goals by subcontracting with DBE's. DBEs tend to concentrate in specialty areas such as the repair and replacement of signs and guardrail causing disproportionate impact on non-DBE sign and guardrail specialty contractors.

The outcome of this case is of particular interest to the *amicus* because of its exclusion from federal contracts as the result of general contractors fulfilling their DBE goals by hiring DBE specialty contractors.

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

In the experience of this *amicus*, programs of numerical proportionality are not benign. They have a significant negative impact on non-DBE companies. Call it the law of unintended consequences, but the burden of the DBE program falls disproportionately on non-DBE specialty contractors and the program is not narrowly tailored.

The following represents a discussion of the practical day to day issues and consequences of the DBE program and presents the concerns of a non-DBE guardrail contractor.

General Contractors:

(1) Want to subcontract only that work they cannot do with their own forces – they seek to perform as much work as possible with their own forces thus restricting subcontracting opportunities to specialty items such as guardrail and signs.

(2) Don't want to seek waivers from goals.

a. They don't want the risk of losing a job in an atmosphere that sometimes can be coercive; threats of forfeited bid bonds, withdrawal of bidding privileges, etc.

b. They don't want to incur extra expenses seeking the waiver in fear of losing a job they anxiously hope to obtain after having invested time and money in the bidding process.

c. They don't want to risk a time-delay in awarding their contract while waiting for the lengthy waiver process to be completed. This can cost the general contractor money.

State Departments of Transportation "DOT" (Recipients):

(1) Are charged with meeting the goals established by the legislature or the implementing state agency, regardless of achievability. New DBE goals published in the Maryland Register propose a 22.8% goal for the Maryland State Highway Administration. Success is measured in numbers, meeting dollar and percentage goals.

(2) DOTs have a self-interest in keeping long term established DBEs in the program. If DBEs graduate, DOTs cannot produce the numbers the legislature demands.

(3) DOTs do not measure the real capacity of DBE's ability to perform. The aggregate DBE capacity is measured by the number of firms able to get on the approval list, not by the DBE's true capacity to perform a certain amount of work.

(4) Goal setting is often based on the amount of specialty items in a proposed contract. For example, a resurfacing project may involve blacktop paving and guardrail updating with no other items of consequence to subcontract other than guardrail. If the job is bid for $2,000,000.00, the guardrail may be worth $200,000.00 and the DBE "goal" for the project 10%. The process is tilted against the non-DBE specialty contractor from the start.

(5) DBE contractors overconcentrate in specialty items like guardrail. The state DOT's do not know how to remedy this overconcentration. Proposed remedies are being considered, but they inherently will reflect a quota system that disproportionately impacts non-DBE specialty contractors.

How many new DBE specialty guardrail contractors should be substituted for non-DBE's in each market before we say we have enough? How much overconcentration in the guardrail specialty-contracting arena is acceptable?

Non-DBE guardrail contractors die a slow death as they surrender their markets to new DBE competitors that enjoy an edge, and seek not to graduate so they can maintain that edge.

(6) Goals are based on junk science. The so-called disparty studies are often based on anecdotal evidence that evolve into unrealistic numerical goals.

Narrow tailoring remedies have been ineffective:

(1) Sales Limits are set at an three-year average annual limit of $16.6 million, a threshold significantly above the capability of the typical guardrail specialty contractor.

> An industry rule of thumb states that each guard rail crew can generate $1 million in annual sales. In the guardrail industry it is extremely rare to find a guard rail company that operates with 16 crews. Guardrail contractors generally do not stray beyond a 100-mile radius. This is because geography is so important relative to maintaining competitive mobilization and travel costs. Within this 100 mile radius, there are no $30 million guard-rail markets (a competitor would have to reach a greater than 50% market share to exceed the size limit).
>
> The end result is that the $16.6 million-dollar limit is totally ineffective and irrelevant as a narrow tailoring remedy. Even if the limit were relevant, why wouldn't a new or established DBE competitor be careful to manage his three-year annual volume to be less than the $16.6 million limit?

(2) Net worth limits are ineffective. The $750,000 limit on net worth excludes the owner's residence and excludes net worth in the business. The DBE program

has seen many professional lawyers, engineers and wives join this program to take advantage of the preference system, even if they have not been subject to racial or ethnic prejudice or cultural bias, because they were presumed to be in a group that was disadvantaged. What if they live in a mansion? What if they distribute their net worth to their children? What if they transfer business ownership to their wives to get their status? Based on recent demographic data from the US Census $750,000.00 is not disadvantaged. The effect of this is to extend preferences to non-disadvantaged members of privileged groups, who like most small business owners have disproportionate amounts of their equity in their homes and businesses.

(3) Waivers are represented as easy to obtain. They are not. General contractors do not want to get involved with the risk factors, costs, and time delays associated with securing a waiver. Non-DBE specialty contractors are forced to present more than a low bid to secure jobs. They need to be "extra low" to induce the general contractor to seek a waiver.

(4) DBE contractors do not have to meet subcontracting DBE goal requirements when they compete for prime (direct bid to owner) contracts. Another example of disproportionate impact on non-DBE specialty contractors who must subcontract and incur the additional costs of subcontracting with their DBE competitors on prime jobs.

(5) Graduation – does not happen because size and net worth are managed to maintain the DBE preference. Every three years DBEs are simply required to recertify. If they can stay under the size and net worth requirements (net of the generous exclusions), they continue to be certified indefinitely. Neither the DBEs nor the state DOTs want graduation. In North Carolina, two DBE guardrail subcontractors dominate the market. One Company is operated by a successful male businessman and they enjoy

preferential status because his sister owns the Company and she is automatically deemed economically disadvantaged. The other Company is run by two male (children) whose Mother owns the Company. These companies have been in the program for many years, they manage their affairs to maintain their status, and have no foreseeable reason to exit the program.

Unfortunately, the record in this case is inadequate to permit an argument that the program at issue is not narrowly tailored by reason of its disproportionate impact on the non-DBE firms. This is due to the inability of the *amicus* to pry this information loose from the public record based on both cost and accessability. But the disproportionate impact does affect the interests of this *amicus*. The *amicus* is frustrated by lack of remedy. In order to launch a lawsuit it is very difficult to establish standing and we risk offending our customers and retaliation. Lawsuits are prohibitively expensive because they know "we will outlast you". Further, general contractors have learned to work around the problem and do not worry about the plight of the non-DBE specialty contractor.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

In *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) ("*Adarand VI*"), this Court remanded the case a second time for the lower courts to rule on the existence of a compelling interest and narrow tailoring of the remedy.

In answering both questions in the affirmative, the Court of Appeals relied on the sufficiency of the Report, "Appendix. The Compelling Interest For Affirmative Action In Federal Procurement," 61 Fed. Reg. 26,060 (1996). ("The Compelling Interest"). Thus, this Court is in a position to rule whether the conclusions in "The Compelling Interest" justify "affirmative action" in the form of a preference program based on numerical proportionality.

This case also affords the opportunity for the Court to rule whether an over-broad program of numerical proportionality is narrowly tailored to withstand strict scrutiny.

This brief will address the issue of narrow tailoring.

The brief will discuss the various devices said to narrowly tailor the DBE program. It concludes that these attempts are without substance.

ARGUMENT

I.

NUMERICAL PROPORTIONALITY BASED ON RACE IS NOT A NARROWLY TAILORED REMEDY FOR SOCIETAL DISCRIMINATION

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the Subcontractor Compensation Clause ("SCC"):

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged

> individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality" and found that numerical proportionality requirements based on race in Federal contracts are narrowly tailored to remedy past societal discrimination App. at 65.

The *amicus* submits that it is not a permissible remedial purpose to create a system of race-based preferences designed to achieve participation to the maximum practicable extent by race-designated companies in Federal contracting.

The Court of Appeals reached the conclusion that the programs at issue were narrowly tailored based on its analysis of the factors identified in *United States v. Paradise*, 480 U.S. 149 (1987). (App. 54-55).

Adarand makes a compelling argument that the government has not identified discrimination with the specificity that justifies any race-based remedy. The necessity for any race-based "remedy" in this case is far less specifically identified than the hiring criteria approved in *Paradise*[2] and reaffirmed in *Adarand III*, 515 U.S. 200, 237.

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[2] *Paradise* involved a judicial remedy imposed on an offender, not a legislative enactment imposing a racial preference on the community at large. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large. *Teachers v. Hudson*, 475 U.S. 292, 309-10 n. 22 (1986).

There are many reasons the program fails to be narrowly tailored. The fundamental problem is that the list of presumptively eligible groups is over inclusive.

A citizen or legal resident who can show ancestry or identify with one of the following groups is presumptively eligible under federal regulations:

> Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, The Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian American (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).[3]

Congress initiated this list,[4] but the SBA has been delegated and has actively applied the authority to decide whether to add groups.[5]

In 1980, dissenting Justices of the Supreme Court first raised this issue in *Fullilove v. Klutznick*.[6] Justice

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[3] 13 C.F.R. § 124.103(b).

[4] *See* 15 U.S.C. § 637(d)(3)(c); 10 U.S.C. § 2323(a)(1).

[5] 13 C.F.R. § 124.103(b).

[6] 448 U.S. 448 (1980) (upholding the use of racial and

Stewart dealt specifically with the issue of the fairness of the manner in which groups were chosen for preferences. Justice Stewart commented:

> In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such assumption, it necessarily paints with too broad a brush.[7]

It was not until *City of Richmond v. J.A. Croson*[8] in 1989, that a majority of the Supreme Court adopted the position that the Constitution required justification for the inclusion of each separate group granted preferences for the groups recognized in *Fullilove*.[9] Justice O'Connor wrote:

> The random inclusion of racial groups, that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps

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ethnic classifications in the Public Works Employment Act of 1976).

[7] *Id.* at 530 (Stewart, J., Dissenting).

[8] 488 U.S. 469 (1989).

[9] *See id.* at 506. Justice Powell expressed concern that the "University [was] unable to explain its selection of only four favored groups – Negroes, Mexican-Americans, American Indians and Asians – for special treatment. The inclusion of the last group [was] especially curious in the light of the substantial numbers of Asians admitted through the regular admissions process." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 309 (1978).

> the city's purpose was not in fact to remedy past discrimination . . . . The gross overinclusiveness of Richmond's racial preferences strongly impugns the city's claim of remedial motivation.[10]

The Court noted that Richmond's adoption of the federal group categories for presumptive eligibility was in the context of a situation in which There is *absolutely no evidence* of past discrimination against Spanish-speaking, Orientals, Indians, Eskimos, or Aleut persons in any aspect of the Richmond construction industry . . . . It may well be that Richmond has never had an Aleut or Eskimo citizen."[11]

Firms owned by persons identifying with these groups or who are women can be classified as disadvantaged business enterprises (DBEs) whether the firms are new or old, successful or unsuccessful. Firms owned by men who are not members of the above groups must show by a preponderance of evidence standard that their owners have suffered chronic racial or ethnic prejudice or cultural bias.[12]

The rules for determining individual social and economic disadvantage are set out in 13 C.F.R. 26, Appendix E to Part 26. As these rules state, they are adopted with minor modifications from SBA regulations concerning social and economic determinations.[13] If a person is socially disadvantaged, he or she will also be presumed to be economically disadvantaged, unless the person exceeds generous net worth standards.

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[10] *Croson*, 488 U.S. at 506.

[11] *Id.*

[12] 63 Fed. Reg. 35, 726-735 (1998).

[13] 13 C.F.R. 124.103(c) and 124.104.

U.S. DOT has stated, "The DBE program is not now, nor was it ever intended to deal solely with economic disadvantage . . . . The intent is clear from the original statutory language of the program which provided presumptive eligibility for certain qualified members of minority groups that have faced discrimination based upon their race in the construction industry throughout the history of the United States." ("DOT's New Disadvantaged Business Enterprise Final Rules," Question: if this program is about economic disadvantage why does it have to consider race?") To the contrary, the creation of the presumptively eligible racial and ethnic groups by Congress and the SBA never had any particular relationship to the construction industry. The same group list is used for all federal race and ethnic-based contracting preference programs which cover, at one time or another, everything the federal government purchases. What should be government aid to businesses with credit problems becomes a contract preference program.

The problem that this *amicus* has experienced is that all attempts to remedy these fundamental flaws by further attempts at narrow tailoring have failed.

DOT published the final regulations for its DBE program on February 2, 1999. 49 CFR Part 26, replaced most of Part 23. The stated purpose:

> The DBE program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a level playing field and foster equal opportunity in DOT-asserted contracts...

Id. In fact the program does none of these. The program basically leaves all problem-solving to the "recipient".

Personal Net Worth 49 CFR Sec. 26.67. "Economic Disadvantage" is determined by imposing a cut-off of $750,000, exclusive of personal residence and the value of the business.

The $750,000 statutory presumption of ineligibility means that (even based on individual net worth rather than family net worth) 91% of business owners would be eligible to participate. See "The Small Business Administration's Minority Business Development Program," Hearing Before the Senate Commission on Small Business, 104th Cong. 42 (1995).

This means that the actual screening criteria for almost everyone are the racial and ethnic presumptions of social disadvantage.

Overconcentration 49 CFR §26.33. The "Interest of the Amicus" describes the problem of overconcentration of DBEs in specialty areas. DOT stated that it lacked data to support a finding of overconcentration. *Id.* (The GAO described the problem in its study "U.S. General Accounting Office Report to Congressional Committees." August, 1994, "Highway Contracting, Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed," GAO/RCED 94-168:

> "For example, with one exception, DBEs received 26 percent or more of the contract dollars awarded in each of these three areas in all four states [Colorado, Connecticut, Georgia, and Wyoming]. In each state, DBEs received 49 percent or more of the contract dollars awarded in at least two of the three areas. DBEs received 86 percent of the landscaping and 90 percent of the fencing and guardrail contract dollars in one state and 100 percent of the traffic control contract dollars in another."

Id. at 11, 24.

DOT's response to the problem was to provide:

> While recipients would have to obtain DOT approval of determinations of over-concentrations and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.

49 CFR §26.33.

Not only does DOT provide no guidance to recipients but it imposes a requirement of federal approval of individual decisions. The approval becomes part of the recipient's DBE program. 49 CFR §26.33. Obtaining approval requires cooperation of prime contractors and state DOTs. That unworkable process guarantees zero attention to overconcentration.

Goal Setting DOT's regulations on goal setting make a chimera of the concept of narrow tailoring.

The principal highway aid program is the Transportation Equity Act for the 21st Century, Pub.L. No. 105-178, ("TEA-21"). Regulations are set forth in 64 Fed. Reg., 5096.

As a condition of receiving TEA-21 funds, states are required to set a goal for DBE utilization that reflects what utilization would be absent discrimination. This requires an accurate assessment of the DBEs and non-DBEs performing construction services for a particular recipient. If that assessment is inaccurate, then the goal which triggers a state's race-conscious efforts will be wrong as well. Since in *Croson* and subsequent cases, the judicial rule has been that the comparison should be between minority and women-owned firms that are comparably "qualified,"

"willing and able to perform a particular service" to non-minority and non-women owned firms.[14]

"Qualified," "willing" and "able" are the three pillars of the *Croson* test; a fortiori, a municipality may not enact race-based remedial measures unless it determines that qualified, willing and able minority contractors have been excluded from participating in public contracting.

See also *Concrete Works v. City of Denver*, 36 F.3d 1513, 1528, (10th Cir. 1994). ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified to undertake the particular task*." (emphasis is original); *Associated General Contractors v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) (faulting a statistical comparison for not taking into account the percentage of minority-owned businesses that "were qualified, willing and able to perform state construction contracts"). The need to compare qualifications in measuring disparities is well-established in the social sciences and cases. See, for example in employment; *Hammon v. Barry*, 813 F.2d 412, 427, n.31 (D.C. Cir. 1987); *Long v. City of Saginaw*, 911 F. 2d 1192, 1199 (6th Cir. 1992); and *Aiken v. City of Memphis*, 37 F.3d 1155, 1165 (6th Cir. 1994); and college scholarships (*Podberesky v. Kirwan*, 38 F.3d 147, 156 (4th Cir. 1994).

The U.S. DOT regulations mimic the "qualified," "willing and able" standard, but do not adopt or enforce it. First, the regulations drop the concept of qualifications altogether and substitute the term "ready"; a term that has no particular meaning. In fact, there are often very significant qualifications (bonding, licenses, experience, equipment,

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[14] *Croson,* 488 U.S. at 509. As the District Court said in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 893 F. Supp. 419, 432 (E.D. Pa. 1995).

etc.) attached to bidding for construction contracts. Second, although the regulations preserve *Croson's* "willing and able" language, U.S. DOT has not defined those terms. Without definition, as is clear from this case and as the regulations themselves state, DOT permits the calculation of goals using data bases (such as census data, Dunn & Bradstreet data, and membership lists) that do not define and have no information on which firms are "qualified," "willing and able" to perform highway construction services. Third, U.S. DOT permits the inclusion of firms that are not DBEs to be counted in shaping a recipient's annual DBE goal. DBEs are firms that have sought state certification because they seek the benefit of being counted to meet DBE goals. Only certified DBEs can be counted to meet DBE goals. DBEs must meet the net worth ownership, size limitations, and other requirements. Most minority and women-owned construction firms have not sought or attained DBE certification. They may not be interested in highway work, or they may not have the qualifications or may not meet the net worth and size limitations, or they may not believe in obtaining work through racial, ethnic or gender preferences. Nevertheless, U.S. DOT permits these minority and women owned firms that are not DBEs to be counted in measuring availability, even as the Department forbids their being counted in utilization. This is obviously a double standard that adds to the unfairness of DBE goals.

While U.S. DOT was bound statutorily to preserve the concept of the presumption of social and economic disadvantage, it made regulatory decisions that have turned that presumption into a racial, ethnic and gender entitlement. First, it made no attempt to reexamine the list of racial and ethnic groups developed by SBA that carry the presumption of social disadvantage or to ask SBA to reexamine the list. SBA's group decisions pre-date *Croson*, let alone *Adarand*, and there has been no reexamination despite the criticism of the overinclusive nature of the list by many courts. Second, with the exception of granting a waiver to Colorado during

the *Adarand* litigation, U.S. DOT has not permitted states to set group-specific goals.

Obviously, if DBEs are not comparably "qualified, willing and able," then any disparities in their utilization and that of non-DBEs may be caused by the difference in qualifications, willingness and ability, not discrimination.

II.

THE SCC AND THE DBE PROGRAM SHOULD BE ENJOINED BOTH AS TO WOMEN-OWNED AND MINORITY OWNED DISADVANTAGED BUSINESSES

The *amicus* suggests that the judgment should be reversed with final judgment ordered Adarand. The government articulated its findings in the record below. There is no suggestion that the program is remedial or narrowly tailored to affect a compelling interest.

The *amicus* have no objection to small business aid programs involving competitive bidding without racial classifications.

If the SCC and the DBE programs are enjoined only as to racial minorities, the effect will be to leave it in force as to women-owned DBEs ("WBEs"). Thus the governmental agency would still have a 5% statutory goal and a 12-15% DBE goal which would be satisfied primarily by women-owned businesses.

The *amicus* suggests that the WBE component of the statute is such an integral part of the program that it should be enjoined as part of the remedy fashioned by the court.

> If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902). Even when Congress has included a separability clause, the court eschews giving the statute "an effect altogether different from that sought by the measure viewed as a whole." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

Section 502 of the Small Business Act proscribes a minimum DBE participation goal of 5% of the total value of all prime contract awards. 15 U.S.C. § 644(g)(1). The participation minimum is expressed in the aggregate: Congress did not specify how much of the goal must be comprised of minority-owned versus women-owned business, but clearly contemplated a mixture of both. Because the participation goal has been expressed as an aggregate and not distinctly allocated between minority-owned and women-owned businesses, the provisions of the SCC and DBE as they apply to racial minorities and women are interdependent, and must both be stricken if one is found unconstitutional.

CONCLUSION

DOT has abandoned any effort to narrowly tailor the DBE program.

Respectfully submitted,

s/Walter H. Ryland

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In The
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.
Petitioner,

v.

NORMAN MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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42 pp

QUESTION PRESENTED

1. Whether, using strict scrutiny analysis, a statutory scheme providing financial incentives for federal contractors to hire women- and specified minority-owned subcon-tractors based on a race-based and gender-based presumption of social disadvantage violates Petitioner's right to the equal protection of the laws.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Constitution of The United States Is Colorblind. 5

A. The Founders intended the law to apply equally to all Americans. 5

B. The Founders put slavery and other such discriminatory practices in the course of ultimate extinction. 7

C. After the Civil War, America's dedication to equal treatment was emphasized again in the Fourteenth Amendment. 9

II. Laws Classifying Americans by Race Are Incompatible with American Institutions and Practices. 13

A. The Constitution and laws of the United States are meant to treat each individual as an individual, not as a member of a caste. 13

B. The end of "Separate But Equal" re-dedicated this country to equal justice under the law. 14

III. "Benign" Classifications Violate Principles of Equal Protection Every Bit As Much As "Invidious" Classifications. 16

A. This racial classification punishes innocent Americans who are not included among the preferred class. 16

B. This racial classification constitutes a badge of inferiority because it presumes that minority group members are incapable of competing in the marketplace. 17

IV. This Racial Set-Aside Program Does Not Withstand Strict Srutiny. 19

A. Government has no compelling interest in dividing Americans by race. 19

B. The statistics relied upon by the Circuit Court to demonstrate a "compelling interest" are irrelevant and misleading. 21

C. This race-based program is not narrowly tailored. ... 23

1. The presumption of disadvantage for minority members is over-inclusive and under-inclusive. 23

2. The government grant to complying general contractors is not narrowly tailored because it is given to contractors regardless of any extra cost the contractor incurs. 24

3. The government's determination of what percentage of minority contractors is "proper" is arbitrary and thus not narrowly tailored. 25

4. The Circuit Court actually used intermediate scrutiny under another name. 26

V. The Circuit Court's Recalcitrance in This Case Demonstrates That This Court Faces The Same Obstacles in Ending "Benign" Racism That It Faced in the *Brown* Era. 27

A. Racial classifications are not abandoned easily 27

B. The Circuit Court's opinion demonstrates the same recalcitrance the Court Faced after *Brown*. 28

C. The Time To End Racial Categorizations in The Law Is Now. 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adarand Constructors v. Slater, 228 F.3d. 1147 (10th Cir. 2000) ..... passim

Anderson v. *Martin*, 375 U.S. 399 (1964) 22

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 19

Brown v. Board of Education, 347 U.S. 483 (1954) 16, 19, 20, 35

Brown v. Board of Education, 349 U.S. 294 (1955) ("*Brown II*") 6, 34, 37

Buchanan v. *Warley*, 245 U.S. 60, 73-74 (1917) 25

Civil Rights Cases, 109 U.S. 3 (1883) 16, 19, 23

Coalition for Economic Equity v. *Wilson*, 946 F. Supp. 1480 (N.D. Ca. 1996), *rev'd.* 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997). 36

Commonwealth v. *Aves*, 35 Mass. 193, 210 (1836) 11

Cooper v. *Aaron*, 358 U.S. 1 (1958) 25, 34

Dale v. *Boy Scouts of America*, 530 U.S. 640 (2000) 2

Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 (1979) 34

DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 21, 22

Dred Scott v. *Sandford*, 60 U.S. (19 How.) 393 (1856) 4, 11

Freeman v. *Pitts*, 503 U.S. 467 (1993) 20

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 14, 23, 25

Green v. County School Board, 391 U.S. 430 (1968) 6, 7, 34

Grutter v. Bollinger, 2001 U.S. Dist. LEXIS 3256

(E.D. Mich. Mar. 1, 2001) 35

Harry v. *Decker & Hopkins*, 1 Miss. 36 (1818) 12

Hirabayashi v. *United States*, 320 U.S. 81, 100 (1943) 19

Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000) 34, 36

Hopwood v. *Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 26, 35, 36

Jackson v. *Bulloch*, 12 Conn. 38 (1837) 11

Johnson v. *Board of Regents of the Univ. Sys. of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000) 26

Korematsu v. *United States*, 324 U.S. 885 (1945) 33

Koski v. Gainer, 1995 U.S. Dist. LEXIS 14604 (N.D. Ill. Oct. 5, 1995) (*mem. op.*) 35

Lau v. Nichols, 414 U.S. 563, 569 (1974) 31

Loving v. Virginia, 388 U.S. 1 (1967) 34

Maryland Troopers Ass'n v. Evans, 993 F.2d 1072 (4th Cir. 1993) 35

McCabe v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914) 18

Metro Broadcasting, Inc. v. *F.C.C.*, 497 U.S. 547 (1990) 14

Missouri ex rel. Gaines v. *Canada*, 305 U.S. 337 (1938) 18

Missouri v. *Jenkins*, 515 U.S. 70 (1995) 17, 22

Oyama v. *California*, 332 U.S. 633 (1948) 18

Palmore v. Sidoti, 466 U.S. 249 (1984) 25

Plessy v. Ferguson, 163 U.S. 537 (1896) 16, 18, 19, 25

Regents of Univ. of California v. *Bakke*, 438 U.S. 265, 298 (1978) ..... passim

Romer v. Evans, 517 U.S. 620 (1996) 37

Sheet Metal Workers v. *E.E.O.C.*, 478 U.S. 421 (1986) 28

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 17

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) 2

Strauder v. *West Virginia*, 100 U.S. 303, 307 (1879). 19

United States v. *Concentrated Phosphate Export Ass'n.*, 393 U.S. 199 (1968)) 30

United States v. *Morrison*, 529 U.S. 598 (2000) 2

United States v. *Paradise*, 480 U.S. 149 (1987) 32

Watson v. Memphis, 373 U.S. 526 (1963) 25

Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd* 218 F.3d 1267 (11th Cir. 2000). 27

Wygant v. *Jackson Bd. of Ed.*, 476 U.S. 267 (1986) 26, 27

STATUTES & CONSTITUTIONS

13 C.F.R. § 124.104(b)(1) 23

15 U.S.C. § 637 (3)(C)(ii) 23

48 C.F.R. 52.219-10 (b) 24

ARCW § 49.60.400 (1) 27

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the self-evident truth of equality articulated in the Declaration of Independence and now codified in the Constitution of the United States guarantees to every individual the right to the equal protection of the law, regardless of his or her race.

The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and monographs about the Founders' views on equality and on the unconstitutionality of laws which categorize Americans on the basis of their race, including Harry V. Jaffa, Equality and Liberty: Theory and Practice in American Politics (The Claremont Institute 1999) (1965), Thomas G. West, Vindicating The Founders: Race, Sex, Class and Justice in The Origins of America (1997), and Edward J. Erler, The Future of Civil Rights: Affirmative Action Redivivus, 11 Notre Dame J. L. Ethics & Pub. Pol'y 15 (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this that involve issues of constitutional significance going to the heart

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

of the founding principles of this nation. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Dale* v. *Boy Scouts of America*, 530 U.S. 640 (2000), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

SUMMARY OF ARGUMENT

The fundamental premise upon which this nation declared its independence in 1776 was the immutable, self-evident truth that "all men are created equal." Although our nation's founders were forced to compromise with the inherited evil of slavery in order to forge a national union, it was their most fervent prayer that by so doing, slavery would be placed in the course of ultimate extinction and the stain on our national commitment to the principle of equality would be forever removed.[2]

Our nation made great strides toward fulfilling its commitment to equality in the early years of its existence. Every one of the northern states abolished slavery, and the national Congress closed the slave trade in 1808, as soon as the Constitution permitted. But over the course of the next two decades, a fundamental transition took place in southern thought that delayed and even threatened to derail the march toward slavery's extinction. Largely drawn from the mind of John C. Calhoun and motivated by financial considerations, leading southerners began to contend that race-based slavery was a "positive good" rather than just a temporary, necessary

[2] *See generally* West, VINDICATING THE FOUNDERS; *see also* Thaddeus Stevens, Speech before the House of Representatives urging passage of the Fourteenth Amendment, Cong. Globe, 39th Cong. 2459 (May 8, 1866) ("It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now").

evil.[3] And in what is surely one of its darkest moments, this Court in 1856 repudiated the principles of the Declaration of Independence, holding in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856), that the equality principle articulated by Thomas Jefferson 80 years earlier had never been intended to apply to *all* human beings. Chief Justice Taney, on behalf of the Court, erroneously contended that "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were . . . intended to be included in the general words used in that memorable instrument." 60 U.S. at 407. "That unfortunate race" was regarded as "so far inferior," Taney wrote, "that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Id.*

Taney's strange notion of justice was not shared by our nation's founders,[4] and happily it was not shared by Abraham Lincoln, who rose to the challenge presented by the Taney Court and, though unfortunately at great cost, restored our nation's commitment to what Lincoln himself termed "our ancient faith," that principle of equality shared by all human beings at all times, that enabled the most recent immigrant to be on a par with the most revered daughter of the

[3] *See, e.g.*, John C. Calhoun, Speech on the Reception of Abolition Petitions, Feb. 6, 1837, *reprinted in* Ross M. Lence, ed., Union and Liberty: The Political Philosophy of John C. Calhoun 474 (1992); George Fitzhugh, Cannibals All: Or, Slaves Without Masters 19 (C. Vann Woodward ed., 1960) (1857) ("The negro slaves of the South are the happiest, and, in some sense, the freest people in the world. The children and the aged and infirm work not at all, and yet have all the comforts and necessaries of life provided for them. They enjoy liberty, because they are oppressed neither by care nor labor").

[4] Thomas Jefferson, for example, wrote with regard to slavery: "I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever," and that the "Almighty has no attribute which can take side with us in such a contest [between slaves and masters]." T. Jefferson, "Notes on the State of Virginia, Query XVIII," *reprinted in* Jefferson: Writings 289 (M. Peterson, ed. 1984).

revolution. *See, e.g.,* A. Lincoln, Speech at Chicago, Illinois (July 10, 1858), *reprinted in* R. P. Basler ed., 3 Collected Works of Abraham Lincoln 484, 499 (1953) (describing the Declaration's statement of equality as the "father of all moral principle," applicable as much to recent immigrants as to descendants of the framers themselves). Nor was Taney's notion shared by Martin Luther King Jr., who called the principle of equality articulated in the Declaration of Independence a "promissory note to which every American was to fall heir." M. L. King, Jr., "I Have A Dream," (Aug. 28, 1963), *reprinted in* A. Meyer et al., eds., Black Protest Thought in the Twentieth Century 346, 347 (2d ed. 1971). King, like Lincoln and Jefferson before him, knew that this, and not Taney's view, was the "true meaning" of the Declaration's creed. *Id.* As Dr. King recognized, it is a principle that requires individuals to be judged on their own merits, "not...by the color of their skin but by the content of their character." *Id.*

The time for government to cease treating individuals on the basis of their skin color rather than their merit is long overdue. As this Court held in *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989), any discrimination on the basis of race must cease, except (perhaps) as a remedy for government's own prior or continuing discrimination on the basis of race. "The time for mere 'deliberate speed' [to fully enforce this principle] has run out." *Griffin* v. *County Sch. Bd.*, 377 U.S. 430, 234 (1968); *see also Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *cf. Brown v. Board of Ed.*, 349 U.S. 294, 301 (1955) ("*Brown II*") (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

It is also time to realize that the principles of the Declaration will likewise not countenance racial discrimination that purports to remedy for past wrongs against individuals of one race by conferring benefits upon others who happen to share the same skin color, at the expense of those who do not. As Dr. King also noted that August day from the steps

of the Lincoln Memorial, "In the process of gaining our rightful place [as beneficiaries of the Declaration's promise of equality,] we must not be guilty of wrongful deeds." King, "I have a Dream," *supra*, at 5.

Five years after this Court's original ruling in this case and more than 10 years after Petitioner was denied a contract merely because of the color of his skin, the Tenth Circuit nominally applied this Court's almost-always-fatal strict scrutiny analysis[5] to torture out the conclusion that the racial presumptions at issue here are nevertheless constitutional, without any evidence of prior discrimination by government or any evidence that the particular beneficiaries of the race-based program were themselves constitutionally entitled to a race-based remedy for past harms suffered. *Adarand Constructors v. Slater,* 228 F.3d. 1147 (10th Cir. 2000). In short, "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of the Petitioner in this case. *Green*, 391 U.S. at 229. It is now for this Court to say, as it said in *Green*, this recalcitrance is unacceptable and that legal categorization by race must end "*now*." *Id.* at 439.

ARGUMENT

I. The Constitution of The United States Is Colorblind.

A. The Founders intended the law to apply equally to all Americans.

The fundamental creed upon which this nation was founded is that "all men are created equal." DECLARATION OF INDEPEN-DENCE ¶2. As Abraham Lincoln would later note, the equality principle articulated in the Declaration is a "great truth, applicable to all men at all times." *Letter from Abraham Lincoln to H.L. Pierce* (Apr. 6, 1859), *reprinted in* 3 Collected Works 374, 376. The principle had previously

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[5] This Court recognized in *Adarand I* that strict scrutiny was not necessarily fatal in fact, 515 U.S. at 237, but the fact remains that it poses a very high burden on government, one that is rarely overcome.

been articulated by John Locke, whose political theory greatly influenced many of our nation's founders: "*All Men by Nature are equal [and have an] equal Right...to [their] Natural Freedom* without being subjected to the Will or Authority of any other Man." John Locke, Two Treatises of Civil Government 346 (P. Laslett, ed., 1963) (1689) (emphasis in original). "All men" meant *all human beings*—men as well as women, black as well as white. *See, e.g.*, James Otis, Rights of the British Colonies Asserted and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), *reprinted in* B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), *reprinted in* P. Kurland & R. Lerner, eds., 1 The Founders' Constitu-tion 6 (1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), *reprinted in* 1 The Founders' Constitution 11. Even those of the founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." *Letter from Thomas Jefferson to Roger C. Weightman* (June 24, 1826), *reprinted in* M. Petterson, ed., Jefferson: Writings 1516, 1517 (1984).

This was true, according to Jefferson, even if people were not of equal capabilities. "[W]hatever be their degree of talent it is no measure of their rights," wrote Jefferson shortly before the end of his second term as President. "Because Sir Isaac Newton was superior to others in understanding, he

was not therefore lord of the person or property of others." *Letter from Thomas Jefferson to Henri Gregoire* (Feb. 25, 1809), *reprinted in id.* at 1202.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[6] Indeed, James Madison even described the "protection of different and *unequal* faculties" as "the first object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788) (emphasis added). Alexander Hamilton echoed this understanding of equality, one of equal rights and opportunities despite inequalities of strengths and talents. *See* The Federalist No. 36, at 217 ("There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their *merit*, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all*" (emphasis added)); *see also* J. Locke, Two Treatises, at 346 ("Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level ...yet all this consists with...the equality I there spoke").

B. The Founders put slavery and other such discriminatory practices in the course of ultimate extinction.

Yet while equality has always been an American ideal, it is also an ideal with which America has long struggled. Slavery, of course, was the great challenge to the principle of equality. James Madison complained at the Constitutional Convention that "[w]e have seen the mere distinction of col-

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[6] The distinction can probably be traced to President Lyndon Johnson's speech at Howard University on June 4, 1965: "[I]t is not enough just to open the gates of opportunity....We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights, in 2 Public Papers of the Presidents 1965 635, 636 (1966).

our made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." M. Farrand, 1 Records of the Federal Convention of 1787, 135 (1911). Benjamin Franklin called slavery "an atrocious debasement of human nature." Franklin, Address to the Public from the Pennsylvania Society for Promoting the Abolition of Slavery, *reprinted in* J. A. Leo Lemay, ed., Benjamin Franklin: Writings 1154 (1987); *see also* West, Vindicating The Founders, at 2-5, 7-10.

The Founders understood that slavery severely tarnished the nation's commitment to the principle of equality, but they were forced to make what they thought would be a temporary compromise with the political power of slave owners in order to secure a national union that could withstand threats from abroad (and hence keep alive the promise of equality at home). They thus inserted into the Constitution specific and (they hoped) temporary protections for slavery. *See* U.S. Const. Art. I, § 2, cl. 3 (three fifths clause); Art. IV, § 2, cl. 3 (fugitive slave clause); *see also* Art. I, § 9, cl. 1 (permitting Congress to prohibit the slave trade after twenty years). Still, the Founders believed they had placed slavery in the "course of ultimate extinction" by establishing the principle of equality in our founding charter. That is why Chief Justice Taney found it necessary to claim that blacks were not "intended to be included in the general words used in that memorable instrument" in order to justify his ruling perpetuating slavery. *Dred Scott,* 60 U.S. at 407.

Earlier courts, however, had recognized what to the Founders was self-evident: slavery was "contrary to natural right and the plain principles of justice." *Commonwealth* v. *Aves*, 35 Mass. 193, 210 (1836). Addressing the equality provision in the Massachusetts Constitution of 1780's Declaration of Rights described above, for example, the Supreme Judicial Court of Massachusetts stated: "It would be difficult to select words more precisely adapted to the abolition of negro slavery." *Id.* In *Jackson* v. *Bulloch,* 12 Conn. 38, 42-43 (1837), the Connecticut Supreme Court held slavery

unconstitutional because the State constitution's "bill of rights, in its 1st section, declares, that all men, when they form a social compact, are equal in rights." Even the Supreme Court of Mississippi admitted in 1818 that slavery was "condemned by reason and the laws of nature." *Harry* v. *Decker & Hopkins*, 1 Miss. 36, 42 (1818). Abraham Lincoln's Emancipation Proclamation in 1863 was thus not a revolution in American principle, but a fulfillment of the principle to which the nation had committed itself four score and seven years earlier, in the Declaration of Independence.

C. After the Civil War, America's dedication to equal treatment was emphasized again in the Fourteenth Amendment.

The end of slavery after the Civil War brought with it new racial challenges, however, such as Black Codes and Jim Crow laws. Racist whites attempted to keep newly freed slaves from voting, earning a living, or owning property. But the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote that "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*." F. Douglass, What The Black Man Wants (Jan. 26, 1865), *reprinted in* Blassingame & McKivigan, eds., 4 Frederick Douglass Papers 59, 68-69 (1991) (emphasis in original). Douglas continued:

> Everybody has asked the question ... "What shall we do with the Negro?" Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us!...[I]f the Negro can not stand on his own two legs, let him fall also! All I ask is, give him a chance to stand on his own legs! Let him alone! ... If you will only untie his hands, and give him a chance, I think he will live.

Id. In other words, Douglass understood "benign" race classifications to be just as pernicious and harmful even to their

supposed beneficiaries as were other racial classifications.

This Court echoed the sentiment in *Adarand I*: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." 515 U.S. at 226 (*quoting Croson*, 488 U.S. at 493)); *see also id.* ("it may not always be clear that a so-called preference is in fact benign" (*quoting Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.))); *id.*, at 239 (Scalia, J., concurring in part and concurring in the judgment) ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred"); *id.*, at 240 (Thomas, J., concurring in part and concurring in the judgment) ("There can be no doubt that the paternalism that appears to lie at the heart of [the federal set-aside program] is at war with the principle of inherent equality that underlies and infuses our Constitution" (*citing* Declaration of Independence, ¶ 2)).[7]

[7] *See also Croson*, 488 U.S. at 516-17 (Stevens, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); *Metro Broadcasting, Inc.* v. *F.C.C.*, 497 U.S. 547, 609-10 (1990) (O'Connor, J., dissenting) ("'Benign' racial classification is a contradiction in terms"); *Fullilove* v. *Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) ("a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when foster-ed by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor"); *Bakke*, 438 U.S. at 295 (opinion of Powell, J.) (noting that the four justices who argued for lower scrutiny offered "no principle for deciding whether preferential classifycations reflect a benign remedial purpose or a malevolent stigmatic classification").

It was precisely to eradicate *all* racial distinctions, invidious as well as so-called benign, that the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution. The primary purpose of these Amendments was to place the newly freed slaves on an equal footing with whites, but the language adopted is not limited to such a purpose. It is instead designed to protect all Americans *equally*. The Civil Rights Act of 1866 declared that "citizens, *of every race and color*...shall have...full and equal benefit of all laws...and shall be subject to like punishment, pains and penalties, and to none other." Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §1981) (emphasis added). After President Andrew Johnson vetoed the Act, Senator Lyman Trumbull denounced him, saying that "The bill...simply declares that in civil rights there shall be equality among *all classes of citizens* and that all alike shall be subject to the same punishment....[A]ll that is required is that, in this respect, its laws shall be impartial." Cong. Globe 39th Cong. 1st Sess. 1760 (1866) (Sen. Trumbull) (emphasis added).

Congress overrode Johnson's veto, and passed the Fourteenth Amendment to guarantee the Act's constitutionality. That Amendment provides that "no State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1, cl. 4. Senator Sherman, one of the principal authors of the Amendment, hoped that "the common sense, the love of fair play, and the spirit of liberty which animate the great body of the people of the United States will cause all those distinctions founded on the old law of slavery to melt away under the progress of our civilization." Cong. Globe 42nd Cong. 2d Sess. 845 (1872). Senator Morton responded that

> the word "protection"...means substantially that no person shall be deprived by a State of the equal

> benefit of the laws...not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law.... [I]n other words, the States cannot create inequalities by their own legislation.... [The Amendment] was intended to strike at all class legislation, to provide that laws must be general in their effects.

Cong. Globe 42d Cong. 2d Sess. 846-847 (1872). The Civil War Amendments were meant, in other words, to "remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to *all citizens of every race and color* ... those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens." *Civil Rights Cases*, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting) (emphasis added).

The principle of equal protection was "[p]urchased at the price of immeasurable human suffering," *Adarand I*, 515 U.S. at 240 (Thomas, J., concurring), but in 1896, this Court again dealt a blow to that principle when, in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), it upheld laws once again classifying Americans by race. The infamous "separate but equal" doctrine was propounded by this Court in *Plessy* over a lone dissent by Justice John Marshall Harlan, who insisted that

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (Harlan, J., dissenting). Fifty-eight years later, in *Brown v. Board of Ed.*, 347 U.S. 483 (1954), this Court repudiated *Plessy*'s separate but equal doctrine in the field of

education, and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" King, "I Have A Dream," *reprinted in* A. Meyer et al., eds., Black Protest Thought in the Twentieth Century 346, 347 (2d ed. 1971).

II. Laws Classifying Americans by Race Are Incompatible with American Institutions and Practices.

A. The Constitution and laws of the United States are meant to treat each individual as an individual, not as a member of a caste.

Laws which distinguish between people on the basis of race are incompatible with these foundational principles because they judge people not as individuals, but as fungible members of a racial class. As Justice Thomas noted in *Missouri* v. *Jenkins*, "[a]t the heart of ... the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups. 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

The Constitution's text makes clear that the rights it was designed to protect are individual rights, not group rights. *See* U.S. Const. amend. V ("No *Person* shall be ... deprived of life, liberty or property, without due process of law") (emphasis added); U.S. Const. amend. XIV ("No state shall...deny to any *person* within its jurisdiction the equal protection of the laws") (emphasis added); *see also Bakke*, 438 U.S. at 289-90 (Powell, J., for the Court) ("The guarantees of the Fourteenth Amendment extend to all persons.... It is settled beyond question that the 'rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights....'" (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948))); *see also McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Oyama* v.

California, 332 U.S. 633 (1948). Indeed, this Court recognized that the Constitutional protection is afforded to individuals, not groups, even under the ignominious separate-but-equal regime approved in *Plessy*. *See McCabe*, 235 U.S. at 161-62 ("It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded").

This understanding of equality as an individual rather than a group right dates back to the founding. "A nation," wrote John Dickenson, "is but an assembly of *individuals* ... [and a] confederation should promote the happiness of *individuals*, or it does not answer the intended purpose." Fabius [John Dickenson], Observations on the Constitution Proposed by the Federal Convention III (April 17, 1788), *reprinted in* B. Bailyn, ed., 2 The Debate on the Constitution 409, 410 (1993) (emphasis in original). That is why "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). "What is [equal protection]," asked this Court in *Strauder* v. *West Virginia*, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States." 100 U.S. 303, 307 (1879).

B. The end of "Separate But Equal" re-dedicated this country to equal justice under the law.

This Court finally held in *Brown* v. *Education* and a series of *per curiam* decisions decided shortly thereafter that the separate-but-equal doctrine articulated in *Plessy* was incompatible with the Fourteenth Amendment's guarantee of equal protection. At the same time, it also held in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), that the Due Process Clause of

the Fifth Amendment afforded individuals the same equal protection from the federal government that the Fourteenth Amendment guaranteed from state governments. "Classifications based solely upon race," the Court held, "are contrary to our traditions and hence constitutionally suspect." *Id.*, at 499; *see also Adarand I*, 515 U.S. at 240 (Thomas, J., concurring) (referring to "the principle of inherent equality that underlies and infuses our Constitution").

This Court thus expressed this nation's recommitment to the principles that Justice Harlan had articulated in dissent in *Plessy* and in *The Civil Rights Cases*:

> The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination....To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatver now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

109 U.S. at 62 (Harlan, J., dissenting). Indeed, as Justice Stevens has previously noted, "The self-evident proposition enshrined in the Declaration—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or reject; it is a matter of principle that is so firmly grounded in the 'traditions of our people' that it is properly viewed as a component of the liberty protected by the Fifth Amendment." John Paul Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 23-24 (Winter, 1992). Quite simply, "the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand I*, 515 U.S. at 240 (Thomas, J., concurring).

III. "Benign" Classifications Violate Principles of Equal Protection Every Bit As Much As "Invidious" Classifications.

Since *Brown*, the rightness of equal protection has come to be widely accepted. *See, e.g., Freeman* v. *Pitts,* 503 U.S. 467 (1993). Yet government racial classifications remain in many places. These programs, often called collectively "affirmative action," are said to satisfy the Constitutional requirement of equal protection because they establish "benign" racial classifications. *See Adarand I,* 515 U.S. at 245 (Stevens, J., dissenting). In fact, they violate equal protection, because they violate the fundamental principle that the protection afforded by the equal protection clause is afforded to individuals, not groups. Such programs punish those not included in the favored class, merely because of race, and they place an unconstitutional badge of inferiority on the alleged "beneficiaries" of such classifications.

A. This racial classification punishes innocent Americans who are not included among the preferred class.

So-called "benign" racial classifications violate the principle of equality because they punish those whose race is not favored by the law. Those disfavored by the classification scheme, solely because of their race, are essentially being punished for the transgressions of their ancestors who owned slaves or discriminated against minorities in centuries past—without even evidence that their *actual* ancestors transgressed. As the Circuit Court in this case admitted, Randy Pech, owner of Adarand Constructors, is being forced to pay for the actions of those who share his racial ancestry. 228 F.3d, at 1183. Not only is this problematic under the Equal Protection clause, but it smacks of an unconstitutional Bill of Attainder as well. *See* U.S. Const. Art. I, § 9; *see also* Federalist No.44, at 282 (J. Madison) (noting that Bills of Attainder were "contrary to the first principles of the social compact and to every principle of sound legislation"). Justice Douglas had it right in *DeFunis* v. *Odegaard*:

> There is no constitutional right for any race to be preferred.... A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S. at 298 (1978) ("there is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making"); *id.*, at 290 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

B. This racial classification constitutes a badge of inferiority because it presumes that minority group members are incapable of competing in the marketplace.

"Benign" racial classifications in the law therefore punish innocent individuals, yet that is not the only reason such classifications are constitutionally problematic. As this Court noted in *Anderson* v. *Martin*, "[t]he vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice." 375 U.S. 399, 402 (1964); *see also Jenkins*, 515 U.S. at 122 (Thomas, J., concurring) ("The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color").

"Benign" racial classifications such as the race-based presumption at issue here amount to a legislative declaration that minority groups are incapable of competing in the marketplace and must be given special assistance. The result is a growing tendency to presume that those minority group members who do succeed were unable to compete fairly, but instead were beneficiaries of government "help." "By formally drawing racial and ethnic lines, affirmative action

invites judgments about the abilities and achievements of those who are members of the targeted groups. One persistent judgment is that those who received a benefit through affirmative action could not have secured it on their own." T. Eastland, Ending Affirmative Action: The Case for Colorblind Justice 8-9 (2d ed. 1997). "Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor." *Fullilove,* 448 U.S. at 545 (Stevens, J., dissenting). Racial paternalism hurts minority group members by not teaching them to compete fairly in the marketplace, and by "provok[ing] resentment among those who believe that they have been wronged by the government's use of race." *Adarand I,* 515 U.S. at 241 (Thomas, J., concurring).

These paternalistic programs "constitute badges of slavery and servitude." *Civil Rights Cases,* 109 U.S. at 36 (1882) (Harlan, J., dissenting). They are akin to legislation that once blocked women from entering a variety of professions, which was "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect." Ruth Bader Ginsburg, Constitutional Adjudication in the United States As A Means of Advancing The Equal Statute of Men And Women Under The Law, 26 Hofstra L. Rev. 263, 269 (Winter, 1997). Such legislation was "ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone," *id.*, but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id.*, at 270.

In exactly the same way, racial set-asides are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing

without a big brother—a white big brother—to guide them.[8] The government may defend these programs by claiming that they are "entirely rational," because minorities as a class are more in need of financial assistance than are whites, but under strict scrutiny, laws reflecting the situation of the average minority member are not good enough. *Cf. id.*, at 268. Indeed, this court explicitly rejected the same statistical arguments proferred by the government and accepted by the Tenth Circuit below when they were put forward in Justice Marshall's dissenting opinion in *Croson. See* 488 U.S. at 504-506. Laws act upon individuals, and the principle of equal protection does not permit the government to attach a badge of inferiority to racial groups merely to achieve some statistical race balance. *See Adarand I,* 515 U.S. at 241 (Thomas, J., concurring).

IV. This Racial Set-Aside Program Does Not Withstand Strict Srutiny.

A. Government has no compelling interest in dividing Americans by race.

Recognizing that there is virtually no legitimate reason for classifying individuals according to race, this Court subjects such classifications to the strictest of scrutiny. *Adarand I,* 515 U.S. at 227; *see also id.*, at 236 (agreeing with Justice Stevens dissenting opinion in *Fullilove* contending for strict scrutiny "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic"). Apart from remedying past or ongoing discrimination by government itself (and even then only when the classification is narrowly tailored to provide the remedy only to those who were actually discriminated against), Govern-

[8] Unfortunately, the results of such "benign" discrimination have often been just as bad for their alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.,* T. Sowell, The Economics and Politics of Race 200 (1983) (illustrating "counterproductive trends" caused by "beneficial" discrimination.)

ment can have no legitimate—let alone "compelling"—interest in creating racial categories among citizens, regardless of whether the categorizations are classified as "benign" or "malign." As Justice Harlan noted in his *Plessy* dissent, "the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.... I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved." 163 U.S. at 554-555 (Harlan, J., dissenting).[9]

A variety of alleged justifications for racial classifications have been proffered to, and rejected by, this Court. *See* E. Chemerinsky, Constitutional Law: Principles And Policies 590-593 (1997). The so-called "diversity rationale" suggested by Justice Powell's separate opinion in *Bakke*, 438 U.S. at 314, was rejected in *Adarand I*, 515 U.S. at 226. *See also Hopwood* v. *Texas*, 78 F.3d 932, 944, *cert. denied*, 518 U.S. 1033 (1996) ("Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case....

[9] *See also Buchanan* v. *Warley*, 245 U.S. 60, 73-74 (1917) ("the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution"); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) ("'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is...this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution'" (quoting *Buchanan*, 245 U.S. at 81)); *Watson v. Memphis*, 373 U.S. 526, 536 (1963) (asserted purpose of preventing racial conflict is insufficient to overcome equal protection guaranties); *Palmore v. Sidoti*, 466 U.S. 249, 434 (1984) ("effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody"); *Adarand I*, 515 U.S. at 239 (Scalia, J., concurring in part) ("government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.")

[T]he classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."); *Johnson* v. *Board of Regents of the Univ. Sys. of Georgia*, 106 F. Supp. 2d 1362, 1368-69 (S.D. Ga. 2000). The justification of racial categories in order to "provide role models" was likewise rejected in *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 275-276 (1986). The suggestion that racial classifications may be used to remedy general societal discrimination has also been rejected. *Id.*, at 274.

B. The statistics relied upon by the Circuit Court to demonstrate a "compelling interest" are irrelevant and misleading.

The only interest this Court has accepted as justifying racial classifications is to remedy *actual past discrimination* by the government agency involved. *Croson*, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *Adarand I*, 515 U.S. at 237.

The Circuit Court went to great lengths to demonstrate that there is an evidentiary basis for Congress' conclusion that minority-owned contractors have been victims of actual discrimination. *See, e.g.*, 228 F.3d, at 1169-1170. Yet the evidence it accepted did not demonstrate either that Gonzalez Contracting—which did receive the contract that Adarand was denied on the basis of race—had ever suffered from discrimination, or that the government had ever acted to discriminate against minority contractors in this field. Instead, the Circuit Court held that the evidence showed "that informal, racially exclusionary business networks dominate the subcontracting construction industry." *Id.*, at 1171; *see also id.*, at 1169 ("evidence demonstrates that prime contractors [belong to] 'old boy' networks"). In other words, even accepting the Tenth Circuit's characterization, *see infra*, the evidence showed at most only general societal

discrimination, which is not amenable to remedy by racially discriminatory legislation. *Wygant*, 476 U.S. at 274.

Secondly, the evidence the Circuit Court relied upon was largely compiled by statistical comparisons, which are irrelevant and highly misleading in this area of the law.[10] In fact, the assumption underlying the use of such statistics—that any disparity must be due to discrimination—is based on a "results" understanding of equality not compatible with the Founder's conception of equality (or the 14th Amendment's) and not grounded in reality. Even assuming perfect non-discrimination, for example, it is "completely unrealistic" to assume, as Justice O'Connor noted in *Croson*, "that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (citing *Sheet Metal Workers* v. *E.E.O.C.*, 478 U.S. 421, 494 (1986)); *see also* T. Sowell, The Vision of the Anointed 37 (1995) (illustrating that "inferences [of discrimination] cannot be made *either* way from the bare fact of statistical differences" (emphasis in original)); Eastland, *supra* at 171-172 (same). As a result, this Court has rejected the suggestion that the government may attempt to equalize the percentages of racial populations in the general public and in a particular market. *See Croson*, 488 U.S. at 507.

Moreover, even if evidence of statistical disparity was sufficient to show actual discrimination by government, the statistical "evidence" the Circuit Court relied upon, precisely like the evidence this Court rejected in *Croson*, did "little to define the scope of any injury to minority contractors in [Denver] or the necessary remedy. *Croson*, 488 U.S. at 505.

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[10] Much of the statistical evidence the Circuit Court relied upon was also flawed. The Brimmer and Marshall study, for example, relied upon by the Court of Appeals below, 228 F.3d at 1172, has been declared "insufficient to establish a strong basis in evidence" for racial set-asides because it suffered from "flaws in the analysis that are insurmountable." *Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1368 (N.D. Ga. 1999), *aff'd* 218 F.3d 1267 (11th Cir. 2000).

Indeed, as in *Croson*, "[t]he factors relied upon by the [Circuit] could justify a preference of any size or duration." *Id.* Far from getting beyond race, such a presumption guarantees race-based decision-making in perpetuity. This simply cannot be squared with the command of equal protection; the government certainly has no "compelling interest" in fostering such a system of racial spoils.

C. This race-based program is not narrowly tailored.

1. The presumption of disadvantage for minority members is over-inclusive and under-inclusive.

Although, as the Circuit Court noted, the regulatory presumption of disadvantage for a particular race has been changed, 228 F.3d at 1185, the new regulations remain unconstitutional. 13 C.F.R. § 124.104(b)(1) still applies to general social discrimination ("social disadvantage") rather than any particularized examples of racial discrimination from an identifiable governmental source. And the presumption of disadvantage has not been wholly eliminated. The statute itself still contains a badge of inferiority: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637 (3)(C)(ii). No change in the *regulation* can effectuate a change in this *statute*.

Moreover, the regulation itself also retains its discriminatory nature. 49 CFR 26.67(a) (2001) still requires the government to "presume that...women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities...are socially and economically disadvantaged individuals." Thus, the Tenth Circuit's claim that new regulations have "eliminated...offending 1996 practices," 228 F.3d at 1185, is disingenuous at best, especially since 49 CFR 26.61 (c) (2001) still holds that minority group members "*do not have the burden of proving*...that they are socially and economically disadvantaged" (emphasis added).

Contrary to the Circuit Court's opinion, therefore, the

"the main obstacle to a finding of narrow tailoring" has *not* "disappeared." 228 F.3d at 1185. That obstacle is the proposition that the government should grant some people favors—and punish other people—on the basis of their racial heritage. Such a proposition is inherently overbroad, because it will necessarily choose some people over others without any rational connection, but merely on the basis of their race. As the district court correctly noted below, "[b]y its very nature, such a program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as reason." 965 F. Supp. at 1580. Such racial presumptions are unconstitutional, and only their total elimination can satisfy the principle of equal protection.

2. The government grant to complying general contractors is not narrowly tailored because it is given to contractors regardless of any extra cost the contractor incurs.

Although the Circuit Court accepted the Respondent's claim that the subcontracting incentive provision is no longer being applied, 228 F.3d at 1194, the provision remains on the books. *See* 48 C.F.R. 52.219-10 (b). And it remains a proper subject for this Court's consideration. *See Adarand II*, 528 U.S. at 224 ("under the circumstances of this case, it is impossible to conclude that...it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'") (*quoting United States* v. *Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)).

This regulation allows the government to determine a percentage—between zero and ten percent—of the total cost of a contracting project; that percentage will then be given to the general contractor as a bonus for "exceed[ing] its subcontracting goals"—*i.e.*, hiring a large number of minority subcontractors. As the District Court noted, this means that government grants to general contractors are actually *bonuses* granted to general contractors who comply, rather than real compensation for actual cost overruns. 965 F.

Supp., at 1579-1580. Although the text of the regulation claims that grants will be given "unless the Contracting Officer determines that the excess was not due to the Contractor's efforts," this permissive language is insufficient to remedy the problem the District Court noted. *See* 48 CFR 52.219-10(b) ("Determinations under this paragraph are unilateral decisions made solely at the discretion of the Government").

Because the amount of the bonus paid to a complying contractor is not tied to the actual amount the subcontract might cost, the result is that the incentive program "spend[s] public funds in a way 'which encourages, entrenches, subsidizes, or results in racial discrimination....' [T]he prime contractor receives addi-tional payment because of a choice based only on race." 965 F. Supp. at 1579-1580 (*quoting Lau v. Nichols*, 414 U.S. 563, 569 (1974)). Thus, even if the program was designed to remedy past discrimination by government, the incentive method of "compensation" encourages race discrimination beyond that which is necessitated by any past governmental discrimination. Such a program cannot be considered narrowly tailored. The Circuit Court claimed to be worried about government becoming a "'passive participant' in a system of racial exclusion," 228 F.3d, at 1164, but, as this case amply shows, it should have been much more worried about government engaging in *active* discrimination against particular individuals, solely on the basis of their race.

3. The government's determination of what percentage of minority contractors is "proper" is arbitrary and thus not narrowly tailored.

The Circuit Court admitted that the percentage of the racial set-aside was set arbitrarily—merely by picking a number "above the current percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole." 228 F.3d at 1181. Yet the Circuit Court held that this arbitrarily chosen number was sufficient to remedy the former, arbitrarily-

chosen percentage of 12 percent. *Id.* One arbitrarily chosen figure cannot be any more or less overly broad than any other arbitrarily chosen figure. It is not for Congress to decide what percentage is the "proper" percentage of minority group members in a particular business—that decision should be made by each individual in that group *as an individual,* when he or she decides to enter that field. As explained *supra*, such statistical examinations are unreliable, unreasonable, and unconstitutional. *Croson,* 488 U.S. at 507.

4. The Circuit Court actually used intermediate scrutiny under another name.

The Circuit Court noted these shortcomings, yet that Court nevertheless upheld racial classifications in the law as being narrowly tailored to advance a compelling government interest. In doing so, the Circuit Court repeated the phrase, "strict scrutiny is not fatal in fact," like a talisman—using the phrase eleven times in its opinion. For instance, although strict scrutiny is not satisfied by a program which will punish innocent parties in the advancement of a government interest, *United States* v. *Paradise*, 480 U.S. 149, 182 (1987), the Circuit Court held that invalidating this program on such grounds "would be to render strict scrutiny effectively fatal." *Id.*, at 1183. Likewise, although the Court agreed that the 1996 subcontractor incentive program "would be more narrowly tailored had the [government] conducted an inquiry into the scope of discrimination within the region it administers as the current regulations mandate," it nevertheless held that "[r]equiring that degree of precise fit would again render strict scrutiny 'fatal in fact.'" *Id.*, at 1186. It is true that strict scrutiny is not necessarily fatal scrutiny, *see, e.g., Korematsu* v. *United States*, 324 U.S. 885 (1945), but this phrase has now become the last refuge of racial categorizations in the law. *See* R. Brad Malone, Note: Marginalizing *Adarand*: Political Inertia and the SBA 8(A) Program, 5 Tex. Wesleyan L. Rev. 275, 284 (Spring 1999) (this phrase "has been the statement around which affirmative action proponents have rallied to gather support for the proposition that federal affirmative action must survive").

By holding that a program which is not narrowly tailored nevertheless satisfies strict scrutiny, the Circuit Court has in fact *not* used strict *scrutiny* at all, but has merely called looser scrutiny by another name. It is clear that the sort of recalcitrance this Court encountered after *Brown* is going on today in defense of laws that confer benefits and punishments on the basis of race.

V. The Circuit Court's Recalcitrance in This Case Demonstrates That This Court Faces The Same Obstacles in Ending "Benign" Racism That It Faced in the *Brown* Era.

A. Racial classifications are not abandoned easily.

Unfortunately, experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like this racial set-aside program. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Brown II, supra; Green, supra; Griffin, supra; Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). Yet, America has made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* C. Bolick, Blacks and Whites on Common Ground, 10 Stan. L. & Pol'y Rev 155, 158 (Spring 1999; Eastland, *supra,* at 164-165 (same). States have begun to incorporate Justice Harlan's colorblind dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); ARCW § 49.60.400 (1) (Washington Initiative 200).

"[I]n a nearly unbroken line of recent decisions, federal courts in recent years consistently have struck down racial preference policies adopted by federal, state, and local

governments." C. Bolick, Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong, 2 Tex Rev. Law & Pol. 60 (Fall, 1997); *see, e.g., Hopwood, supra*; *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993); *Koski v. Gainer*, 1995 U.S. Dist. LEXIS 14604 (N.D. Ill. Oct. 5, 1995) (mem. op.); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Grutter v. Bollinger*, 2001 U.S. Dist. LEXIS 3256 (E.D. Mich. Mar. 1, 2001); *but see Smith* v. *Univ. of Washington Law Sch.*, 233 F.2d 1188 (9th Cir. 2000), *cert. denied*, 69 USLW 3593 (May 29, 2001).

B. The Circuit Court's opinion demonstrates the same recalcitrance the Court Faced after *Brown*.

Nevertheless, the Circuit Court's opinion makes clear that the ending of "benign" racism is going to be at least as difficult as the ending of "malign" racism in the decades after *Brown*. *See, e.g.,* 228 F.3d., at 1155 (characterizing Justice Scalia's assertion that racial classifications in the law are unconstitutional as a mere "as-piration" which will only be realized on "some future day"); *id.*, at 1157 (defending its earlier decision that case was "moot" but noting that this Court "disagreed"); *id.*, at 1167 (noting that "[w]e cannot merely recite statements made by members of Congress alleging a finding of discriminatory effects and the need to address those effects," yet doing so anyway). *See also* Malone, Marginalizing, *supra* at 299 (noting government's "effort to marginalize *Adarand*'s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination").

California's recent experience with Proposition 209 is a foretaste of things to come. Even though that Proposition said only that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting," the Federal District Court for the Northern District of California struck down the law as a violation of the Fourteenth Amendment. *Coalition for*

Economic Equity v. *Wilson*, 946 F. Supp. 1480 (N.D. Ca. 1996). The Ninth Circuit reversed. 122 F.3d 692 (9th Cir. 1997), *cert. denied,* 522 U.S. 963 (1997). *See also Hi-Voltage Wire Works, Inc. v. City of San Jose,* 24 Cal. 4th 537 (2000) (explaining history of Prop. 209); L. A. Graglia, *"Affirmative Action," Past, Present, and Future*, 22 Ohio N.U.L. Rev. 1207, 1219 (1996) (noting "recalcitrance" in ending racial preferences); C. E. Anderson, A Current Perspective: The Erosion of Affirmative Action in University Admissions, 32 Akron L. Rev. 181, 208 n. 135 (1997) (quoting school official's "promise" to "ignore the *Hopwood* decision"); *see also* Statement of President Clinton, U.S. Newswire, Washington, D.C. July 19, 1995 (claiming *Adarand III* "actually reaffirmed the need for affirmative action").

C. The Time To End Racial Categorizations in The Law Is *Now*.

"It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans,* 517 U.S. 620 (1996). Randy Pech asks only a fair chance to compete for government contracts. Now, as this Court faces increasing recalcitrance against eliminating legal classifications in the law, it must speak with the same language it used in the post-*Brown II* cases. "[T]he vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II,* 349 U.S. at 300.

In the marble above the grand entrance to this court are chiseled the words, "Equal Justice Under Law." The Court should ratify this principle by holding that legally dividing Americans by race is unconstitutional under any

circumstances. It should embrace the doctrine of complete racial equality, and stand "for what is best in the American dream and for the most sacred values in our Judaeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence." Martin Luther King, Letter from Birmingham Jail, *reprinted in* M. L. King, Why We Can't Wait 99 (1964).

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit should be *reversed* and the district court's grant of summary judgment for Petitioner reinstated.

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IN THE

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v.

NORMAN Y. MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

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26 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THIS COURT REQUIRES A "STRONG BASIS IN EVIDENCE" FOR THE ENACTMENT OF ANY RACIAL CLASSIFICATION	7
II. THE LEGISLATIVE HISTORY OF TEA-21 REVEALS THAT CONGRESS NEGLECTED ITS OBLIGATION TO JUSTIFY THE CHALLENGED PROGRAM	13
CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases:

Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995) ..... *passim*
Associated Gen. Contractors of Ohio, Inc. v. *Drabik*, 214 F.3d 730 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 1089 (2001) 8,11,18
Board of Trustees v. *Garrett*, 121 S. Ct. 955 (2001) 10
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) ..... *passim*
Concrete Works of Colo., Inc. v. *Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) 11
Contractors Ass'n of E. Pa., Inc. v. *City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) 11
Coral Constr. Co. v. *King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) 10
Engineering Contractors Ass'n of S. Fla., Inc. v. *Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996) 12
Engineering Contractors Ass'n of S. Fla., Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) 11,16,18
Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 7,8,9,20
Hazelwood Sch. Dist. v. *United States*, 433 U.S. 299 (1977) 16
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 10,18
O'Donnell Constr. Co. v. *District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) 11
Shaw v. *Hunt*, 517 U.S. 899 (1996) 7,8
Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) 8
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 7,8,15

Constitution:

U.S. Const. amen . V 13

TABLE OF AUTHORITIES—Continued

Page

U.S. Const. amend. XIV, § 5 5,13

Statutes:

15 U.S.C. § 631(f)(B) 20
15 U.S.C. § 631(f)(C) 20
15 U.S.C. § 631(f)(D) 20
15 U.S.C. § 631(f)(F) 20
15 U.S.C. § 637(d)(1) 4
15 U.S.C. § 637(d)(2) 4
15 U.S.C. § 637(d)(3)(A) 4
15 U.S.C. § 637(d)(3)(C) 5
15 U.S.C. § 637(d)(4)(B) 4
15 U.S.C. § 637(d)(4)(B)(i)-(iv) 4
15 U.S.C. § 637(d)(4)(D) 5
15 U.S.C. § 637(d)(6)(A) 4
15 U.S.C. § 644(g)(1) 4
15 U.S.C. § 644(g)(2) 4
Intermodal Surface Transportation Efficiency Act of 1991, 105 Stat. 1914 3
Small Business Act, § 8(d),15 U.S.C. § 637(d). ..... *passim*
Surface Transportation and Uniform Relocation Assistance Act of 1987, 101 Stat. 132 3
Surface Transportation Assistance Act of 1982, 96 Stat. 2097 3
Transportation Equity Act for the 21st Century of 1998, 112 Stat. 107 3,13,14,19
§ 1101(b)(1), 112 Stat. 113 5
§ 1101(b)(2)(B), 112 Stat. 113 5
§ 1115, 112 Stat. 154 5
Pub. L. No. 95-507, § 201, 92 Stat. 1760 (1978) 20
Pub. L. No. 96-302, § 118, 94 Stat. 840 (1980) 20

Rules:

S. Ct. R. 37.2(a) 2
S. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

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H.R. Rep. No. 105-467 (1998) 14
144 Cong. Rec. H2006 (1998) 14,15
144 Cong. Rec. H2010 (1998) 15,18
144 Cong. Rec. H3957 (1998) 17,18
144 Cong. Rec. H3958 (1998) 16,17,18
144 Cong. Rec. H3959 (1998) 18
144 Cong. Rec. S1398 (1998) 14
144 Cong. Rec. S1400 (1998) 14
144 Cong. Rec. S1403 (1998) 15
144 Cong. Rec. S1404 (1998) 18
144 Cong. Rec. S1409 (1998) 15,18
144 Cong Rec. S1410 (1998) 15
144 Cong. Rec. S1413 (1998) 18
144 Cong. Rec. S1417 (1998) 17
144 Cong. Rec. S1420 (1998) 15,18
144 Cong. Rec. S1421 (1998) 15,
144 Cong. Rec. S1422 (1998) 17
144 Cong. Rec. S1426 (1998) 14,15,17,18
144 Cong. Rec. S1430 (1998) 17
144 Cong. Rec. S1483 (1998) 18
144 Cong. Rec. S1490 (1998) 17
144 Cong. Rec. S1492 (1998) 15
144 Cong. Rec. S1493 (1998) 18
144 Cong. Rec. S1494 (1998) 15
144 Cong. Rec. S1496 (1998) 15

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61 Fed. Reg. 26,050 (1996) Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey 5,6,16,19
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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC"), is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry. [1] AGC has more than 100 state and local

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Associated General Contractors of America, Inc., or its members made a monetary contribution to the preparation or submission of the brief.

chapters, with at least one chapter serving the general contractors and related firms in each State, and one chapter in Puerto Rico. AGC's more than 32,000 regular and associate members engage in the construction of highways, bridges, tunnels, airports, dams and other water conservation projects, water works and waste treatment facilities, and defense facilities.

AGC has long supported open competitive bidding for public construction contracts. That system typically requires interested contractors to submit sealed bids by a specified date and time. It also requires the government agency to open all bids publicly and to award the contract to the lowest responsive and responsible bidder. For these reasons, open competitive bidding typically precludes discrimination based on race or ethnicity, and AGC vigorously opposes any such discrimination. AGC has helped and will continue to help its chapters offer training and other assistance to minority firms.

AGC participated previously in this case by filing an amicus curiae brief in support of certiorari and by filing amicus curiae briefs in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000) (decision below). AGC argued in these briefs that the federal government's use of a race-based contracting preference is subject to, and in this case cannot survive, strict scrutiny. In conflict with decisions of this Court, the Tenth Circuit below held otherwise.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

The Challenged Program. The United States Department of Transportation ("DOT") has two Disadvantaged Business Enterprise ("DBE") programs. One applies to contracts that DOT awards to prime contractors for the construction of

highways and other transportation projects on federal lands. The other applies to grants and other financial assistance that DOT provides to the states and others for the construction of similar projects. This case implicates only the first of these two programs. It arose out of a contract between DOT and a prime contractor for the construction of a highway on federal property in Colorado.

The DBE program that applies to such contracts establishes, among other things, goals for awarding subcontracts to small business concerns owned and controlled by "socially and economically disadvantaged individuals." It includes financial penalties and incentives to induce prime contractors to achieve those goals. At the heart of the DBE program lies a presumption that members of certain racial groups are presumed to be "socially and economically disadvantaged."

The Statutory Bases. Congress first authorized the challenged program in 1978 when it enacted § 8(d) of the Small Business Act, 15 U.S.C. § 637(d). In a series of subsequent authorization measures for the construction of highways and other transportation projects, Congress included provisions independently authorizing DOT to implement its DBE program. The first of these measures was the Surface Transportation Assistance Act of 1982 ("STAA"). 96 Stat. 2097. It was followed by the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), 101 Stat. 132, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), 105 Stat. 1914, and the Transportation Equity Act for the 21st Century of 1998 ("TEA-21"), 112 Stat. 107. Each of these measures succeeded and replaced the preceding one.

Section 8(d) of the Small Business Act declares it to be "the policy of the United States that * * * small business concerns owned and controlled by socially and economically disadvantaged individuals * * * shall have the maximum practicable opportunity to participate in the performance of

contracts let by any Federal agency." 15 U.S.C. § 637(d)(1).[2] In furtherance thereof, all contracts let by any federal agency, with certain exceptions not relevant here, must include a clause which reiterates that policy and instructs contractors to presume that "socially and economically disadvantaged individuals" include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * *." *Id.* at § 637(d)(2), (d)(3)(A), (C).

Section 8(d) also provides that "[b]efore the award of any contract to be let * * * by any Federal agency * * * the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan" which includes, among other things, "percentage goals for the utilization as subcontractors of * * * small business concerns owned and controlled by socially and economically disadvantaged individuals." *Id.* at § 637(d)(4)(B), (d)(6)(A).[3] "No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror * * * provides the maximum practicable opportunity for * * *

[2] The Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). The Act also requires the head of each federal agency to set agency-specific goals for participation by "small business concerns owned and controlled by socially and economically disadvantaged individuals" in the procurement contracts of such agency. *Id.* at § 644(g)(2).

[3] This requirement applies to all contracts (1) which are let "pursuant to the negotiated method of procurement"; (2) which are required to include § 8(d)'s race-based presumption; (3) which "may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts"; and (4) which offer "subcontracting possibilities." 15 U.S.C. § 637(d)(4)(B)(i)-(iv).

small business concerns owned and controlled by socially and economically disadvantaged individuals * * * to participate in the performance of the contract." *Id.* at § 637(d)(4)(D).

Like its predecessors, TEA-21 provides that "not less than 10 percent" of certain amounts authorized for appropriations under the Act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." § 1101(b)(1), 112 Stat. 113. These amounts include funding for the Federal Lands Highway Program, under which the contract in this case was awarded. *See* § 1115, 112 Stat. 154. TEA-21 also states that the term "socially and economically disadvantaged individuals" has "the meaning such term has under section 8(d) of the Small Business Act." § 1101(b)(2)(B), 112 Stat. 113. As noted, in defining "socially and economically disadvantaged individuals," § 8(d) includes a presumption that "socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * *." 15 U.S.C. § 637(d)(3)(C).

The Evidence of a Compelling Interest. In an effort to establish a compelling need for the DBE program challenged in this case, the government has cited and primarily relied on a document entitled "Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey," 61 Fed. Reg. 26,050 (1996) ("Appendix"), and the hearings and reports cited therein. *See* Reply Br. for the Federal Appellants in the United States Court of Appeals for the Tenth Circuit at 9-15.[4] More recently, the government

[4] The Appendix—prepared by the Justice Department in the wake of this Court's first decision in *Adarand* with an eye toward the litigation to follow from this Court's 1995 remand—purports "to summarize the evidence that has been assembled to date on the compelling interest question" and "the legislative record that

has cited and relied on the legislative record of TEA-21. *See* Opp. Cert. 5-6, 15-16, 23.

SUMMARY OF ARGUMENT

In its first opinion in this case, this Court made clear that *all* racial classifications, even those characterized as "benign," "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *See Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 226-227, 235-236 (1995). In order for a race-based program to survive this exacting review, the government must do more than merely articulate a compelling governmental interest. Rather, there must be a "strong basis in evidence" to support its conclusion that action based on race is necessary. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

The compelling interest offered by the government here—and accepted by the Tenth Circuit below—is remedying the effects of past and present discrimination against minority contractors in the construction industry. In enacting TEA-21, however, Congress took little note of its obligation to assemble contemporary evidence of such discrimination. The legislative history of TEA-21 contains conclusory statements by individual members of Congress on the floor of the House and Senate, but no body of evidence that Congress, as a whole, may have considered sufficient to demonstrate a compelling need for the program. Although Congress has received evidence purporting to justify the use of racial preferences over the years, Congress has never considered the sort of evidence that would support the use of the race-based contracting preference at issue here.

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underpins the acts of Congress that authorize affirmative action measures in procurement." 61 Fed. Reg. at 26,050. It was extensively relied on by the Tenth Circuit below. *See* Pet. App. 31-44. But as petitioner and others explain, the Appendix fails to demonstrate a compelling interest for the racial preference at issue here.

ARGUMENT

I. THIS COURT REQUIRES A "STRONG BASIS IN EVIDENCE" FOR THE ENACTMENT OF ANY RACIAL CLASSIFICATION.

In *Adarand*, this Court ruled that "all racial classifications, imposed by whatever federal, state, or local government actor," are subject to strict scrutiny. 515 U.S. at 227. To satisfy this most demanding level of equal protection review, a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 235.

There is no question that remedying the effects of past or present discrimination is a compelling governmental interest that would justify a racial preference in an appropriate case. *See id.* at 237; *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996). But "simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. *See also Adarand*, 515 U.S. at 226 ("[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.") (quotation omitted) (alteration in original). Instead, this Court has insisted on a " '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (opinion of Powell, J.) (emphasis added). *See also Adarand*, 515 U.S. at 236 (" '[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be *clearly identified*' ") (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 533-535 (1980) (Stevens, J., dissenting)) (alteration in original) (emphasis added).

In applying strict scrutiny, this Court accordingly conducts a "close examination" of the "factual basis" for a racial

classification. *Croson*, 488 U.S. at 495 (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975)). As this Court observed in *Adarand*:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. [515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (opinion of O'Connor, J.)).]

On several occasions, this Court has made clear that a legislative body should determine whether a "factual basis" for a racial preference exists at the time the preference is enacted. *See Shaw*, 517 U.S. at 910 ("the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program' ") (quoting *Wygant*, 476 U.S. at 277 (opinion of Powell, J.)) (emphasis added in *Shaw*); *Adarand*, 515 U.S. at 229 (" '*Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute.' ") (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)) (emphasis added in *Adarand*); *Croson*, 488 U.S. at 504 (legislative bodies "must identify * * * discrimination * * * with some specificity *before* they may use race-conscious relief") (emphasis added). *See also Associated Gen. Contractors of Ohio, Inc.* v. *Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) ("[U]nder *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute *in advance of its passage*; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding.") (emphasis added), *cert. denied*, 121 S. Ct. 1089

(2001). Indeed, it would make no sense for a legislative body to enact a racial preference before determining whether it was supported by a "strong basis in evidence" simply because it might be fortuitously justified after the fact. Moreover, unless it clearly identifies the nature and scope of the discrimination it seeks to remedy, a legislative body cannot begin to craft a narrowly tailored remedy. Thus, "[p]roper findings * * * are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510 (opinion of O'Connor, J.).

As this Court emphasized in *Adarand*, a race-based program must also be "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.' " 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). *See also Croson*, 488 U.S. at 510 ("findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a *temporary* matter") (opinion of O'Connor, J.) (emphasis added). Accordingly, it will not do for a legislative body simply to reenact a racial preference that may have been justified at some point in the past; the legislative body must assure itself of the continuing justification for any such racial preference. This requires a "strong basis in evidence" at the time the legislative body acts; simple reliance on evidence that may have once supported a racial preference will not satisfy strict scrutiny.

If the legislative record reveals that the legislative body made little or no effort to determine whether a "strong basis in evidence" supported the enactment of a racial preference, a court should be particularly skeptical that the preference serves a compelling governmental interest. *See Adarand*, 515 U.S. at 228 ("courts should take a skeptical view of all governmental racial classifications").

In *Croson*, this Court conducted a "searching judicial inquiry" into the "factual basis" for a municipality's minority set-aside program and held that program unconstitutional. 488 U.S. at 498-506.[5] Because *Croson* dealt with a racial preference intended to combat alleged discrimination in the construction industry, the manner in which the Court applied strict scrutiny is particularly instructive here.

At the outset, the *Croson* Court established that past "societal discrimination" cannot justify the use of a racial preference. *Id.* at 499 ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts."). The Court also made clear that "an amorphous claim that there has been past discrimination in a particular industry" also cannot support the use of a racial preference. *Id.* Thus, wholly conclusory statements by members of a legislative body "are of little probative value in establishing identified discrimination in [a particular] construction industry." *Id.* at 500. *See also id.* at 501 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.").

Statistical proof, on the other hand, can be far more probative. *Id.* at 501.[6] But as the *Croson* Court made clear, not all

[5] This Court has also recently conducted a "close examination" of the legislative record in cases involving Congress' exercise of its remedial authority under § 5 of the Fourteenth Amendment. *See Board of Trustees* v. *Garrett*, 121 S. Ct. 955, 964-966 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 89-91 (2000).

[6] Indeed, since *Croson* the courts of appeals have found that a "strong basis in evidence" for a racial classification generally cannot be shown "without a proper statistical foundation." *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 919 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992). *See also Engineering Contractors Ass'n of S. Fla. Inc.* v. *Metropolitan Dade County*, 122 F.3d 895, 925 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Concrete Works of Colo., Inc.* v. *Denver*, 36 F.3d 1513, 1520, 1530 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1003, 1005 (3d Cir. 1993); *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

statistical evidence is probative of discrimination. For instance, the Court concluded that evidence that minority businesses received 0.67% of the City of Richmond's prime contracts while minorities constituted 50% of the city's population had "little probative value." *Id.* at 501 (quotation omitted). "[W]here special qualifications are necessary, the relevant statistical pool * * * must be the number of minorities qualified to undertake the particular task." *Id.* at 501-502. *See also id.* at 509 ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.") (opinion of O'Connor, J.); *Drabik*, 214 F.3d at 736 (rejecting data that "does not distinguish minority construction contractors from minority businesses generally, and *a fortiori* makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size").

The *Croson* Court also indicated that statistical disparities should be closely examined to determine whether they might be explained by factors other than racial discrimination. For instance, the Court observed that the small number of minority firms in the local construction industry could be the result of "a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital,

inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record." 488 U.S. at 498-499. With respect to the low minority membership in local contractors' associations, the Court concluded that "[t]here [were] numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white entrepreneurial choices." *Id.* at 503.

Significantly, the *Croson* Court made clear that a racial preference intended to remedy discrimination in the construction industry should be supported by evidence of discrimination in the particular sector of the construction industry to which the preference is applied. *See id.* at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.").[7] Similarly, a racial preference must be supported by evidence of discrimination in each particular geographic region in which the preference is applied. As the *Croson* Court observed, this Court "has never approved the

[7] For classification purposes, the federal government divides the construction industry into three main sectors—(1) building, developing, and general contracting; (2) heavy (including highway); and (3) special trade. *See* Office of Management and Budget, Executive Office of the President, *North American Industry Classification System: United States* 89-104 (1997). These three sectors are further broken down into numerous subsectors. *See id.* As one court has noted, "Firms that build hospitals (SIC 15) do not compete for County contracts with firms that lay asphalt (SIC 16) or firms that install plumbing (SIC 17), therefore comparisons between these disparate entities would not produce a reliable portrait of County contracting trends." *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metropolitan Dade County*, 943 F. Supp. 1546, 1560 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998).

extrapolation of discrimination in one jurisdiction from the experience of another." *Id.* at 505. Finally, there must be evidence of discrimination against each particular racial group included within the scope of a racial preference. *See id.* at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.").

These insights from *Croson* on how strict scrutiny should be applied to a racial preference affecting a municipality's methods of awarding construction contracts are directly pertinent to this case involving a federal preference. As this Court explained in its first opinion in this case, "the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable," and "congruence between the standards applicable to federal and state racial classifications" is one of the core principles governing analysis in this area. *Adarand*, 515 U.S. at 217, 226.

II. THE LEGISLATIVE HISTORY OF TEA-21 REVEALS THAT CONGRESS NEGLECTED ITS OBLIGATION TO JUSTIFY THE CHALLENGED PROGRAM.

As noted, TEA-21 is the latest statute to authorize DOT's use of a racial preference in awarding federal highway contracts. Although it was enacted a full generation after Congress first authorized DOT's DBE program in 1978, nothing in the Act's legislative history indicates that Congress carefully considered whether there was a "strong basis in evidence" for continuing that program. Indeed, as several members of the House specifically noted:

> No evidence [was] presented to [the Committee on Transportation and Infrastructure, to which the House bill was referred] that actual discrimination has occurred within the transportation construction industry. No evi-

> dence [was] presented that race-neutral remedies were attempted and found deficient. No evidence [was] presented justifying the use of the program on a nation-wide basis. No statistical evaluations [were] presented justifying the use of the program in any given market. No evidence [was] presented justifying the fact that the program does not include a procedure for individualized inquiries into whether a particular DBE has suffered from past discrimination. [H.R. Rep. No. 105-467, at 500 (1998) (additional views).]

Similarly, as pointed out by Senator Sessions, who sat on the Environment and Public Works Committee to which the Senate bill was referred, "there is no legislative record to support this racial classification." 144 Cong. Rec. S1400 (1998). The Environment and Public Works Committee "had no hearings, took no testimony, [and] did no study as to the advisability and the practicality of how these preferences work out in real life." *Id.* at S1398. The committee "made no findings, [and] made no factual analysis of the interstate highway program in order to determine [whether] there is some sort of systematic discrimination ongoing that ought to be corrected." *Id.* at S1400.

During the floor debates on TEA-21, some members of Congress attempted to justify the DBE program's race-based presumption of disadvantage. None of them, of course, purported to speak for Congress as a whole. Nor did any of them cite or produce evidence sufficient under this Court's precedents to demonstrate a compelling need for that racial presumption.

Much of the "evidence" put forth consisted of the sort of conclusory statements this Court has held "[have] no place in equal protection analysis." *Croson*, 488 U.S. at 501. *See, e.g.*, 144 Cong. Rec. at S1426 ("There is discrimination in the construction industry.") (Sen. Domenici); *id.* at H2006 ("The fact remains that as a result of continued discrimination * * * minority-owned firms remain underrepresented in the construction field.") (Rep. Jackson-Lee); *id.* at H2010 ("If [members of Congress] do not believe that discrimination exists in the construction industry, they are blind.") (Rep. Towns); *id.* ("Discrimination is alive and well and manifesting itself through the difficulties minorities * * * continue to face in securing access to contracts.") (Rep. Dixon).

In fact, many such statements simply referred to "societal discrimination," which this Court has identified as " 'too amorphous for imposing a racially classified remedy.' " *Croson*, 488 U.S. at 497 (opinion of O'Connor, J.) (quoting *Wygant*, 476 U.S. at 276). *See* 144 Cong. Rec. at S1403 ("Let's face the facts. We all wish we lived in a society that does not discriminate based on * * * race. Well, we don't. * * * [M]embers of minority groups face barriers that the rest of us do not. That is why the DBE Program was created.") (Sen. Baucus); *id.* at S1410 ("[W]e still have discrimination in our country—does anybody believe that America is blind to issues of race? * * * Does anybody believe that we don't want to try and redress some major historical grievances? That is what we are doing through this program.") (Sen. Wellstone); *id.* at S1420 ("Racism [is an] unhappy, but still very real, phenomen[on] in our society. The DBE program is one of our responses to those lingering effects * * *.") (Sen. Mosley-Braun).

Some members of Congress cited statistics purporting to demonstrate a compelling need for the use of a race-based contracting preference in the construction industry. One set of statistics frequently cited was that while minorities make up over 20 percent of the population, minority-owned firms constitute only 9 percent of all construction firms and receive only 5 percent of all construction business receipts. *See id.* at S1409, S1421, S1426, S1492, S1494, S1496, H2010. But these statistics hardly suffice to show pervasive racial dis-

crimination in the construction industry.[8] To begin with, any comparison between the number of minority construction firms and the general minority population is "misplaced." *Croson*, 488 U.S. at 501. As this Court held in *Croson*, " '[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.' " *Id.* (quoting *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 n.13 (1977)) (alteration in original).

Likewise, the alleged disparity between the percentage of minority-owned firms and the percentage of construction business receipts may be explained by factors that have nothing to do with race. For instance, in the aggregate, minority-owned firms may be smaller than nonminority firms, and thus may generate lower business receipts. *See, e.g.*, *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997)

[8] In fact, it appears that these statistics may be inaccurate. Although the members of Congress who cited these statistics failed to identify their source, it appears that they may have been misquoting statistics cited in the Appendix that minorities make up over 20 percent of the population, yet minority-owned businesses constitute 9 percent of all U.S. businesses and receive 4 percent of all business receipts. *See* 61 Fed. Reg. at 26,054 (citing statistics); *see also* 144 Cong Rec. at H3958 (Rep. Norton) (same). Statistics concerning minority construction firms might in fact be more favorable. Moreover, the statistics cited in the Appendix "are based on 1987 census data, the most recent full data available regarding the status of minority-owned businesses." *Id.* at 26,054 n.33. Thus, the statistics cited in support of TEA-21 may not only be inaccurate, but over a decade old. *See also* General Accounting Office, *Disadvantaged Business Enterprises* (GAO-01-586) 41 (June 1, 2001) (lack of information makes it "impossible to define the universe of DBEs, compare them with the transportation contracting community as a whole or gain a clear understanding of the overall impact of the DBE program").

("the disparities illustrated by the County's statistical analysis * * * are better explained by firm size than by discrimination"), *cert. denied*, 523 U.S. 1004 (1998). Other factors might include "[l]ack of interest in the particular work, other commitments, limitations [on] the amount of work they can handle, [and] lack of qualifications, especially where a State spends a large portion of its funds on a single large project requiring special contractors." 144 Cong. Rec. at S1417 (Sen. McConnell) (citing DOT regulations).

Another oft-repeated statistic was that white-owned construction firms receive 50 times more loan dollars than black-owned firms with identical equity. *See id.* at S1422, S1426, S1430, S1490, H2010, H3958. But that alleged disparity—the foundation of which was never explored—may also be explained by entirely nonracial factors. For instance, white-owned firms may be more established than black-owned firms, a factor that certainly has an effect in the lending market.[9] In any event, if such statistics are probative of any discrimination, it is discrimination in the lending market, *not* the construction industry. Under *Croson*, such statistics could not support the enactment of a remedial scheme in the construction industry. *See* 488 U.S. at 498. The same is also true of statistics concerning the bonding market. *See* 144 Cong. Rec. at S1430 (Sen. Kennedy) (citing statistics purporting to show disparity in obtaining bonding); *id.* at H3958 (Rep. Norton) (referring to alleged discrimination by bonding companies). Moreover, this particular statistic concerns black-owned firms only, and thus does not constitute *any* evidence of discrimination against the other

[9] Any difficulties faced by minority firms in gaining experience or establishing a proven track record—such as the lack of access to business networks, for example—are not in themselves indicative of racial discrimination. Indeed, such "nonracial factors * * * would seem to face a member of *any* racial group attempting to establish a new business enterprise." *Croson*, 488 U.S. at 498 (emphasis added).

racial groups included within the DBE program's race-based presumption. *See Croson*, 488 U.S. at 506 (even if evidence had shown discrimination against blacks, it would not support inclusion of other racial groups in set-aside program).

Much emphasis was also placed on statistics showing that more contracts are awarded to minority-owned firms when DBE programs are in place. *See, e.g.*, 144 Cong. Rec. at S1404, S1409, S1420, S1426, S1483, H2010, H3958. But it is hardly surprising that more contracts may be awarded to minority-owned firms when financial incentives or quotas are used. The fact that fewer contracts may be awarded when such programs are invalidated or discontinued is not probative of discrimination.

Some reference was also made to testimony and other evidence presented to Congress over the years. *See id.* at S1413, S1493, H3957-58.[10] That evidence, however, is

[10] Much of these materials are compiled in the Appendix, discussed *supra* at 5 & n.4.

One member of Congress also cited a number of state and local disparity studies. *See* 144 Cong. Rec. at H3958-59 (Rep. Norton). There was no indication in her statement, however, that those studies demonstrate the sort of disparity that the *Croson* Court indicated might be probative of discrimination—one demonstrating a "gross statistical disparit[y]" between "the number of minorities *qualified* to undertake [a] particular task" and the number actually engaged in a particular locality. 488 U.S. at 501-502 (emphasis added). *See generally Drabik*, 214 F.3d at 736 (rejecting disparity study); *Engineering Contractors*, 122 F.3d at 924 (same). And even if they were probative, they would still not support the use of a national preference. *See Croson*, 488 U.S. at 505 ("We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."); *cf. Kimel*, 528 U.S. at 90 (even if 1966 report uncovered pattern of age discrimination in California's public agencies at the time, it was

plainly insufficient to demonstrate a compelling interest for the race-based presumption contained in TEA-21. Even if a "strong basis in evidence" for that presumption once existed, Congress was required to determine whether there was a continuing justification for extending its duration. Thus, Congress should have made specific findings to enable it "to define both the scope of [any] injury and the extent of [any] remedy necessary to cure its effects." *Croson* 488 U.S. at 510 (opinion of O'Connor, J.). As noted, however, the Committees which reviewed this legislation failed to take *any* testimony or compile *any* evidence concerning discrimination in the construction industry and the need for remedial action. Congress could not meet the strict scrutiny mandated by this Court simply by relying on evidence it had previously received for a variety of legislative purposes over a period of more than twenty years. *See, e.g.*, 61 Fed. Reg. at 26,052 & n.18.

In any event, the evidence presented to Congress over the years is plainly insufficient to support a nationwide remedial program applicable to nearly every racial minority in every type of construction business. There is no evidence of discrimination in every sector of the construction industry, in every geographic market, against every racial group covered by the DBE program. Under *Croson*, the lack of such evidence is fatal. *See* 488 U.S. at 498, 505-506.

There is a similar lack of support for the race-based presumption in § 8(d) itself. At the time Congress amended the Small Business Act to include that presumption in 1978, it made general findings that many persons "are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices," and that "such groups include * * * Black Americans, Hispanic Americans, Native Americans, and other

insufficient to support Congress' 1974 extension of ADEA to every State of the Union).

minorities." Pub. L. No. 95-507, § 201, 92 Stat. 1760 (1978). *See also* 15 U.S.C. §631(f)(B), (C).[11] Congress also made findings "that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups," and that such conditions could be improved through "the procurement by the United States of articles, equipment, supplies, services, materials, and construction work" from "small business concerns owned by socially and economically disadvantaged groups." Pub. L. No. 95-507, § 201, 92 Stat. 1760. *See also* 15 U.S.C. §631(f)(D), (F).

Of course, "[m]ore than good motives" were required for such broad-based remedial action. *Adarand*, 515 U.S. at 226 (quotation omitted). Congress, however, made no particularized findings concerning discrimination in any given industry. As noted, since then Congress has never considered the kind of evidence that would support the use of a race-based contracting preference in every procurement contract covered by § 8(d).

* * *

As this Court held in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and [Congress] is not disqualified from acting in response to it." 515 U.S. at 237. But precisely because "classifications based on race are potentially so harmful to the entire body politic," *id.* at 236 (quoting *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting)), Congress must establish a "strong basis in evidence" before it takes race-conscious remedial action. Because Congress has never established the requisite basis for the race-based

[11] In 1980, Congress included "Asian Pacific Americans" within its findings and extended the § 8(d) presumption to that group. *See* Pub. L. No. 96-302, § 118, 94 Stat. 840 (1980).

contracting preference employed by DOT in this case, that preference cannot stand.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

A. Overview of the Racial Presumptions, Statutes, and Regulation 2

B. Overview of Respondents' Purported "Evidence" 12

SUMMARY OF ARGUMENT 15

ARGUMENT 16

I. The Court Should Not Permit Respondents to Rely On Evidence That Was Merely "Available to Congress" When Defending Naked Racial Classifications 17

II. The Court Should Not Permit Respondents to Rely Upon Vague, Conclusory and Ill-Defined Allegations of "Passive Participation" 22

CONCLUSION 30

TABLE OF AUTHORITIES

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Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 8, 12, 14, 17

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Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996) 23

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DynaLantic Corp. v. Department of Defense, Civil Action No. 95-2301 (D.D.C.) (EGS) ..... passim.

O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) 20, 22

Plyler v. Doe, 457 U.S. 202 (1981) 17

Reno v. Bossier Parrish, 528 U.S. 320 (2000) 1

Shaw v. Hunt, 517 U.S. 899 (1996) 18, 21, 22

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977 (1988) 20

Constitutional Provisions, Statutes and Regulations:

15 U.S.C. § 631(f)(2) 4, 19

15 U.S.C. § 637(a) ..... passim.

15 U.S.C. § 637(d)(3)(C)(ii) 3

15 U.S.C. § 637(d) ..... passim.

Pub. L. No. 105-178, 112 Stat. 107 2

Pub. L. No. 106-451, 114 Stat. 1 5

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13 C.F.R. § 124.1002(c) (2000) 7

13 C.F.R. § 124.1008 (2000) 9

13 C.F.R. § 124.1008(g) (2000) 9

13 C.F.R. § 124.101 (2000) 5

13 C.F.R. § 124.103(a) (2000) 6

13 C.F.R. § 124.103(b)(1) (2000) 4

13 C.F.R. § 124.103(c) (2000) 10, 11

13 C.F.R. § 124.103(c)(1) (2000) 6

13 C.F.R. § 124.104 (2000) 6

13 C.F.R. § 124.104(a) (2000) 6

13 C.F.R. § 124.104(c)(2) (2000) 7

13 C.F.R. § 124.105 (2000) 10

13 C.F.R. § 124.2 (2000) 10

48 C.F.R. part 19 (2000) 3

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49 C.F.R. § 26.5 (2000) 5

49 C.F.R. § 26.67(a)(2)(iii) (2000) 7

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49 C.F.R. § 26.67(d) (2000) 6

49 C.F.R. § 26.69 (2000) 10

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INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a non-profit, public interest law firm. It has participated in the litigation of numerous cases concerning the use of race by government officials before this Court, including *Reno v. Bossier Parrish*, 528 U.S. 320 (2000). CIR also is counsel of record to DynaLantic Corp. in *DynaLantic Corp. v. Department of Defense, Small Business Administration, and the Department of the Navy*, Civil Action No. 95-2301 (D.D.C.) (EGS) (hereinafter, "*DynaLantic*"), which is pending in the United States District Court for the District of Columbia. That case involves a challenge to the federal government's use of race in procurement, and was cited by Petitioner and Respondents in their Petition for Writ of Certiorari and Opposition to that petition, respectively.[1]

CIR believes that it is in a unique position to assist the Court in its consideration of this case. In connection with the *DynaLantic* case, and as a public interest law firm, CIR has obtained and studied various government documents as well as other information concerning some of the statutes and race-conscious mechanisms at issue. Those documents include the government's "post-*Adarand*" review of some of the statutes cited by Petitioners and Respondents as well as deposition transcripts, discovery

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

responses, and other material that go to the heart of the issues and the government's representations. Part of that review consisted of questions propounded by the U.S. Department of Justice ("DoJ") to agencies like the U.S. Small Business Administration ("SBA"). *See* Lodged Doc. 1, "U.S. Small Business Administration Management of the 8(a) Program: Narrow Tailoring" (hereinafter, "SBA 8(a) Document"). CIR believes that the Court should have the benefit of that information and, accordingly, has lodged some of that material with the Clerk's Office.

STATEMENT OF THE CASE

CIR adopts the statement of the case in the petition. We highlight some significant facts and errors by the appeals court.

A. Overview of the Racial Presumptions, Statutes, and Regulations

The Disadvantaged Business Enterprise ("DBE"), Program administered by the U.S. Department of Transportation ("DoT"), which Congress enacted most recently as the Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, is part of a wide and far-ranging scheme of race-conscious statutes and regulations that share a common framework and intersecting definitions and applications. Section 1101(b)(2)(B) of TEA-21 provides that "[t]he term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. § 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this

subsection."[2]

Accordingly, to analyze the DBE Program, it also is necessary to have an understanding of Section 8(d) of the Small Business Act. Pursuant to Section 8(d), any person who holds herself or himself out and identifies himself or herself as a member of the following racial or ethnic *groups* shall be presumed to be socially *and* economically disadvantaged: Black Americans, Hispanic-Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the SBA pursuant to the Section 8(a) of the Small Business Act (15 U.S.C. § 637(a)) and its implementing regulations (the "Section 8(a) Program"). According to Section 8(d), the presumption is mandatory.[3] Moreover, any group presumed to be socially disadvantaged under the Section 8(a) Program is also be presumed to be disadvantaged for purposes of Section 8(d) and the DBE Program. *See* 15 U.S.C. § 637(d)(3)(C)(ii). Consequently, to analyze the DBE Program, it also is necessary to understand the Section 8(a) Program.

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[2] TEA-21, through its implementing regulations, provides mechanisms for both direct federal procurement and federal financial assistance to states and localities. *See* 49 C.F.R. part 26; 48 C.F.R. part 19. The procurement that initiated this action was let directly by the federal government and contained a clause that prevented Adarand from bidding on the subcontract at issue on an equal basis with other firms. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1156 (10th Cir. 2000).

[3] *See* 8(a) Business Development/Small Disadvantaged Business Status Determination, 63 Fed. Reg. 35767, 35770 (June 30, 1998) ("Section 8(d)(3)(C)(ii) clearly authorizes a presumption of both social and economic disadvantaged [sic] for members of certain designated groups."). In response to a federal agency commentator, the SBA "believe[d] that eliminating the presumption for economic disadvantage would be contrary to the underlying statutory authority." *Id.*

Under the SBA Program, the groups listed in the last paragraph receive a presumption of social disadvantage. The identity of the groups is not set forth on the face of Section 8(a); instead, the identity of the major groups is set forth in 15 U.S.C. § 631(f)(2), which contain the Congressional findings, and which the SBA relied upon to promulgate a regulation listing these groups (and their alleged "subgroups") as entitled to a presumption of social disadvantage. Other minority groups subsequently were added by legislation or through SBA regulation so that under the Section 8(a) Program (and for Section 8(d) and the DBE Program), any person who holds herself or himself out and identifies himself or herself as a member of the following racial or ethnic groups is presumed to be "socially disadvantaged": Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau) , Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal) and members of other groups that the SBA designates from time to time. 13 C.F.R. § 124.103(b)(1) (2000).[4]

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[4] The SBA does not have a procedure whereby it reviews the groups after they receive a presumption of being disadvantaged. *See* Lodged Doc. 2, p. 21, line 12 to p. 22, line 22 (deposition excerpts of SBA's representative in *Rothe Development Corp. v. Department of Defense, et al.*, Civil Action No. SA98CA1011EP (W.D. Tex.) (*"Rothe"*). Accordingly, no race or ethnicity has ever been removed from the list of presumed groups. Lodged Doc. 2, p. 23, lines 1-2.

The SBA considers American citizens from Portugal, among others, to be of Hispanic descent and entitled to a presumption of social disadvantage. *See* Lodged Doc. 2, p. 51, lines 2-5.

Only U.S. citizens are eligible to participate in the Section 8(a) Program. 13 C.F.R. § 124.101 (2000). Both U.S. citizens and lawful permanent resident aliens are eligible to participate in the DBE Program. *See* 49 C.F.R. § 26.5 (2000). In both programs, however, there is no *per se* length of a time an individual must identify himself or herself with one of the identified groups or be a member of American society to receive the presumption of social disadvantage.

Women are not presumed to be socially or economically disadvantaged under Sections 8(a) or 8(d) of the SBA Act. There is no explanation given as to why women are included in one statutory scheme (for DoT) and excluded in another statutory scheme (for the SBA). In fact, in 1982, the SBA denied the petition filed on behalf of women for inclusion as a presumed socially disadvantaged group. *See* SBA 8(a) Document at 15.

The government claims that other groups, such as Italian-Americans, were victims of discrimination. *See* Wartime Violation of Italian American Civil Liberties Act, Pub. L. No. 106-451, 114 Stat. 1. Yet, they are not included in the list of presumed groups.

Under the DBE and Section 8(a) Programs, and Section 8(d), persons who are not members of the presumed groups must establish by a preponderance of the evidence that they are "socially and economically disadvantaged." 49 C.F.R. § 26.67(d) (2000); 13 C.F.R. § 124.103(c)(1) (2000); 13 C.F.R. § 124.104 (2000).

"Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within *American society* because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control." 13 C.F.R. § 124.103(a) (2000) (emphasis added); 49 C.F.R. part 26, App. E (2000). Thus, proof of societal discrimination (including for those *groups* who petitioned for presumed disadvantaged status) suffices to establish social disadvantage.

"Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a) (2000); 49 C.F.R. part 26, App. E (2000). However, the SBA does not make that comparison between socially disadvantaged individuals and non-socially disadvantaged individuals. *See The Abuses in the SBA's 8(a) Procurement Program, Hearing Before the Committee on Small Business of the House of Representatives*, 104th Cong., 1st Sess. 107 (1995) (testimony of Karen S. Lee, Deputy Inspector General of the SBA; hereinafter "*Lee Testimony*") ("This failure allowed participants to continue in the 8(a) program although the strong financial condition of their companies

should no longer have qualified them as economically disadvantaged.").

Persons are not "economically disadvantaged" and are ineligible for the Section 8(a) Program if their net worth is $250,000 or more, *excluding* the equity in their principal residence and value of their business (*i.e.*, in reality an "adjusted net worth"). *See* 13 C.F.R. § 124.104(c)(2) (2000). *See also* 13 C.F.R. § 124.1002(c) (2000). "For continued ...eligibility after admission to the program, net worth must be less than $750,000." *Id.* For the DBE Program, only persons with a net worth of $750,000 or more, *excluding* the equity in their primary residence and equity in their business, are ineligible. 49 C.F.R. § 26.67(a)(2)(iii) (2000).

As revealed by a U.S. Department of Commerce study, the vast majority of Americans would qualify as "economically disadvantaged" under any of the definitions identified in the previous paragraph. *See* Davern, Michael E. and Patricia J. Fisher, *U.S. Census Bureau, Household Net Worth and Asset Ownership: 1995,* at xiv (table G); at 7 (table 4); at 8-9 (table 5) (1995). Thus, the economic prong of the disadvantage "test" does little to exclude individuals from participating in the DBE or similar programs. For all practical purposes, social disadvantage is the gateway into the program (thereby making the racial and ethnic presumptions far more important than the government wishes to admit).

There are wealthy individuals eligible for preferences in the Section 8(a) Program (which has a lower economic test than the DBE Program) when their "total net worth" is considered. *See Lee Testimony* at 107 ("Wealthy individuals continued to be eligible for the 8(a) program

because the equity in their companies and primary residences and the net worth of their spouses were not considered in determining whether they remained economically disadvantaged due to statutory exclusions.").

At least with respect to the Section 8(a) Program, the presumption of social disadvantage is conclusive, not rebuttable. After this Court's decision in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995), the federal government undertook a government-wide review of its race-conscious affirmative action programs. The SBA 8(a) Document is one product of that review. The SBA admits that its contents are true and correct. *See* Lodged Doc. 3, interrogatory response No. 2, at 2, in *DynaLantic* (Exhibit B referenced therein was the SBA 8(a) Document); *see also* Lodged Document 4, interrogatory response No. 18, at 13, in *DynaLantic,* explaining creation of the SBA (Exhibit B referenced therein was the SBA 8(a) Document).

According to the SBA 8(a) Document, "membership in certain designated minority/racial groups is conclusive as to social disadvantage in the Section 8(a) Program." *See* SBA 8(a) Document, at 3, No. 8. The "presumption is rebutted *only* when there is a question of whether or not an applicant is in fact a member of one of the designated groups." *See also id.* at 8, No. 3; at 9, No. 8 (emphasis added). The SBA determined that *Congress intended* to confer a conclusive presumption of social disadvantage on these groups. *See* SBA 8(a) Document, at 2, No.6; *see also id.* at 3, No. 8.

Again, TEA-21 incorporates the racial and ethnic presumptions in Section 8(d) which, in turn, incorporates those and any group designated as disadvantaged under Section 8(a). Thus, by virtue of the Section 8(a) conclusive

presumption, any group or individual so designated is entitled to a presumption of disadvantaged status under the DBE and similar programs. And any member of that racial group for Section 8(a) purposes is conclusively (not rebuttably) presumed to be socially disadvantaged.

These consequences are reinforced by the fact that DoT and SBA have entered into a Memorandum of Understanding (available at http://osdbuweb.dot.gov/business/legislation/memofunder.html) providing for reciprocal certifications so that DBEs and small disadvantaged businesses ("SDBs")[5] can obtain, with minimal additional showings, entrance into the programs administered by DoT and SBA. Thus, aside from entrance through the statutory scheme, firms could seek to obtain DBE certification through the conclusive social presumption in the Section 8(a) Program.[6]

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[5] SDBs are firms that are considered to be socially and economically disadvantaged within the definition of 15 U.S.C. § 637(d) and its implementing regulations. All Section 8(a) firms automatically qualify as SDBs. 49 C.F.R. § 26.67(c) (2000); 13 C.F.R. § 124.1008 (2000); 13 C.F.R. § 124.1008(g) (2000). The SBA now certifies firms as SDBs. The government removed the ability of SDBs to "self-certify" their status as "disadvantaged" to reduce costs, prevent fraud and abuse and allegedly ensure that the program is administered fairly. *See* SBA News Release, No. 98-78 at 1 (SBA Press Office, September 21, 1998). *See generally* GAO, *Small Business: Status of Small Disadvantaged Business Certifications* (2001).

[6] DoT also apparently participates in the Section 8(a) Program pursuant to which contracts are set-aside, for which firms like Adarand cannot bid on. The various race-based affirmative action programs are duplicative, in whole or in part, insofar as they give preferential treatment to certain races. However, set-asides are a notable contrast to the provisions of TEA-21 dealing with federal financial assistance to states and local governments. *See The New DoT DBE Rule Is Narrowly Tailored* at 1 (Set-asides are limited to egregious cases of discrimination

Firms certified to participate in the DBE, Section 8(a), and SDB Programs must be owned and controlled at least 51% by individuals who are socially and economically disadvantaged, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations. 13 C.F.R. § 124.105 (2000); 13 C.F.R. § 1002(b)(2); (2000); 49 C.F.R. § 26.69 (2000). Thus, non-minority owners can reap the benefits of preferential treatment through a 49% ownership interest.

Firms are eligible to remain in the Section 8(a) Program for a maximum of nine years. 13 C.F.R. § 124.2 (2000). Very few firms have graduated from the Section 8(a) Program (*i.e.*, exited the program before nine years). There is no sunset provision for the Section 8(a) Program.

Given the racial and ethnic presumptions, it is not surprising that as of September 3, 1999, there were approximately 5,830 firms participating in the Section 8(a) Program of which approximately 105 (approximately 1.8%) were owned and controlled by individuals who established individual social disadvantage pursuant to 13 C.F.R. § 124.103(c) or its predecessor regulation. The other approximately 98.2% of the firms that were participating were owned and controlled by individuals who were presumed to be socially disadvantaged pursuant to a racial or ethnic presumption. *See* Lodged Doc. 4, interrogatory responses nos. 4 & 28, at 5, 18-19, in *DynaLantic*.

As of November 2, 1999, there were approximately 7,596 firms considered SDBs under Section 8(d), of which

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where other remedial mechanisms have not worked) (available at http://osdbuweb.dot.gov/business/dbe/NTcht.html?prettyprint=yes).

approximately 211 (approximately 2.7%) were owned and controlled by individuals who established individual social disadvantage pursuant to 13 C.F.R. § 124.103(c) or its predecessor regulation. The other approximately 97.3% of the firms that were participating were owned and controlled by individuals who were presumed to be socially disadvantaged pursuant to a racial or ethnic presumption. *See* Lodged Doc. 4, interrogatory responses nos. 5 & 28, at 5, 18-19, in *DynaLantic*.

The presence of so many firms that gained entrance through racial and ethnic presumptions is not surprising. Non-presumed members in the DBE and other program must individually establish social and economic disadvantage, criteria which – outside of the racial presumptions – are irredeemably vague. The General Services Administration told DoJ that with respect to the test for social and economic disadvantage:

> It appears from the proposed rule [proposing to change the standard for non-minorities from clear and convincing to preponderance of the evidence] that the SBA is expected to do something that it has not been able to do for the past 15 years.
>
> * * *
>
> We understand the conventional wisdom to be that the problems associated with non-minority eligibility (for instance, the small number of non-minorities admitted to the programs and the perceived difficulty of the standards) stem from the lack of specificity in the criteria and not the standard of proof.

See Lodged Doc. 5, at 4 (obtained through a Freedom of Information Act Request). Aside from that difference, the SBA also has published and disseminated material that highlights its efforts for the benefit of "minority" contractors and to increase the participation and certification of minority businesses in the Section 8(a) Program. *See* Lodged Doc. 6 (news releases and various memoranda of understanding with third parties; no longer available on the SBA's website).

B. Overview of Respondents' Purported "Evidence"

As with the statutory and regulatory scheme, the true state of Respondents' "evidence" purportedly supporting a "strong basis in evidence" for believing that these are continuing effects of past discrimination reveals a very different tale from those adopted by the Tenth Circuit.

In ruling against Adarand, the Tenth Circuit relied upon a list of manufactured "evidence" that the court believed Congress relied upon. *See Adarand*, 228 F.3d 1167 ("we turn to an examination of the evidentiary basis on which Congress relied to support its finding of discrimination. . . ."). First and foremost, the Tenth Circuit relied upon the so-called Appendix A[7] and the documents cited therein (such as the government-commissioned meta-study by the Urban Institute). However, Appendix A was "pretty much" the work of a then DoJ paralegal. DoJ took the draft report of Appendix A prepared by the paralegal, examined it for editorial mistakes and, subject to editorial changes, made it part of

[7] Public Notice Regarding Proposed Reforms to Affirmative Action in Federal Procurement (including the Appendix thereto entitled, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey"), 61 Fed. Reg. 26041 (May 23, 1996).

the Federal Register. Lodged Doc. 7, p. 25, lines 12-18; p. 31, lines 21-32; p. 53, line 1, 7-17; p. 128, line 13-18) (deposition excerpts of DoJ employee testifying on behalf of the United States in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, et al.*, Court File No. 00-CV-1026 JMR/RLE (D. Minn.) and *Gross Seed Company v. Nebraska Department of Roads, et al.*, Court File No. 4:00CV3073 (D. Neb.) (hereinafter "*Sherbrooke*")).

No one at DoJ knows whether and to what extent the paralegal reviewed the documents cited in Appendix A. Lodged Doc. 7, p. 35, line 15 to p. 36, line 14) (deposition excerpts in *Sherbrooke*). DoJ does not know if any of the alleged instances of discrimination or anecdotal reports in that document are true or if anyone read or even looked at any of the documents cited therein. Lodged Doc. 7, p. 37, lines 10-21 (deposition excerpts in *Sherbrooke*).

The federal government's post-*Adarand* review of affirmative action programs after 1995 was largely confined to the issue of narrow tailoring. If a racially-different treatment in a federal program was authorized by Congress, DoJ assumed that Congress had found a compelling interest and only reviewed the program for narrow tailoring. Lodged Doc. 7, p. 20, lines 13-17; p. 21, lines 6-8; p. 24, lines 14-21; p. 28, lines 15 to p. 29, line 2; p. 144, lines 1-4 (deposition excerpts in *Sherbrooke*).

Accordingly, it is not surprising that the SBA has not conducted any investigation or inquiry as to (1) the truthfulness, accuracy, or correctness of documents that it claims support the constitutionality of Section 8(a) and similar programs; or (2) the facts, grounds and documents that allegedly provide a strong basis in evidence to use those programs. Lodged Doc. 3, interrogatory response

No. 1, at 1, in *DynaLantic*. Respondents cannot say that Congress relied upon Appendix A or any document cited therein for enacting the DBE or Section 8(a) Programs or Section 8(d); respondents simply do not know and (with all due respect) neither did the Tenth Circuit.

Neither Congress nor the SBA considered the operation of non-race-conscious alternatives, such as anti-discrimination laws, before establishing the race-conscious requirements in the Section 8(a) Program. *See* SBA 8(a) Document, at 4, No. 1. Thus, the Tenth Circuit's attempt to distinguish *Croson* on that ground is just incorrect. *See Adarand, 228 F.3d at 1163.* The SBA also has not used other race neutral means that might also increase minority participation in contracting, such as the application of different standards regarding start-up costs, bonding costs, or other criteria for emerging businesses. *See* SBA 8(a) Document, at 6, No. 6.

Congressional hearings and reviews of the Section 8(a) Program also have not focused on the need for the racial preference. *See* SBA 8(a) Document, at 14, No. 5. In fact, Congress does not review the racial requirements in the Section 8(a) Program when new authorization is enacted. *See* SBA 8(a) Document, at 14, No. 4. The SBA also does not evaluate the need for the racial requirement. *See* SBA 8(a) Document, at 14, No. 6; at 1, No. 1.

SUMMARY OF ARGUMENT

The government defends its use of racial presumptions on two grounds. First, that they are rebuttable and, second, that the economic test excludes wealthy individuals from participating. Neither is true. The government's internal documents prove that the presumption of social disadvantage is conclusive for the Section 8(a) Program. Section 8(d) and, in turn, TEA-21 grant disadvantaged status to groups and individuals that the SBA designates as socially disadvantaged under Section 8(a). Other material shows that, by virtue of excluding a person's equity in a business and principal residence, wealthy people gain entrance to and remain eligible for preferential treatment. In any event, the high ceiling for net worth in the economic test excludes few people from participating.

The government's key evidence in this case, Appendix A, does not constitute a strong basis in evidence or a compelling interest. The federal government itself has not and is not discriminating against minority contractors in government procurement. The government does not know if anyone read any of the materials cited in Appendix A, and agencies that rely on it for race-conscious programs (like the SBA) never conducted any investigation into its alleged truth, accuracy, or completeness. Respondents must attempt to rely on that kind of "manufactured" evidence because it does not know what Congress actually relied upon to enact these kinds of race-based programs.

The federal government's statistical evidence is equally infirm. Adarand operates in the "construction subcontracting industry." According to the government's study, (1) construction and the construction subcontracting

operate regionally and (2) there is no disparity in the award of federal contracts or subcontracts to minorities in those construction and construction subcontracting in Adarand's region. (In fact, the government's study shows that minority contractors are "overutilized" therein.) Nor, according to a different government-commissioned report, is there a statistically significant disparity in the construction subcontracting industry regarding the award of state and local contracts. Moreover, that report did not conclude that any disparity cited therein was the result of discrimination; instead, it concluded that any number of factors could have caused the purported disparities in the examined areas.

Respondents cannot prove any intentional discrimination by the federal government, and rely only on ill-defined notions of "passive participation." Ultimately, respondents have only allegations of societal discrimination to defend their admitted use of race against Adarand.

ARGUMENT

The heart and soul of the DBE Program, and of the federal government's scheme that uses the twin pillars of Sections 8(a) and 8(d), are the racial and ethnic presumptions.[8]

Here, race is the key and critical component of the Programs.

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[8] No one, including the SBA, knows whether Congress would have enacted or re-enacted the Section 8(a) Program or Section 8(d) without race-conscious mechanisms or racial and ethnic presumptions. *See* Lodged Doc. 4, interrogatory response No. 25, at 16, in *DynaLantic*.

I. The Court Should Not Permit Respondents To Rely On Evidence That Was Merely "Available to Congress" When Defending Naked Racial Classifications

The use of race is an anathema to the concept of a free and democratic society. It is for that reason that government's use of racial classifications must be held to the highest scrutiny. Accordingly, the government has or should have the burden to prove that its racial classification passes strict scrutiny. *Adarand,* 515 U.S. at 224 ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989). Accordingly, the government has the ultimate burden of proving that it has a compelling interest to use race and that the means chosen are narrowly tailored. "With respect to such classifications [that disadvantage a suspect class or impinge on the exercise of a 'fundamental right'], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Yet, here and with regard to the racial classifications in Sections 8(a) and 8(d), the government has turned a blind eye. Respondents do not know what Congress actually *relied upon*. The Tenth Circuit's citation of such alleged evidence, *Adarand*, 228 F.3d at 1167, shows that the appeals court profoundly misunderstood the nature of the government's purported "strong basis in evidence." Realizing that they cannot identify the contemporaneous evidence that Congress relied upon,

respondents have attempted to create a record of evidence that was "available" to Congress that *might* justify the Programs. By definition, the contents of the Library of Congress is "available" to Congress. If "availability" alone satisfied the test for strict scrutiny, the government should link to the library's card catalogue to bolster the purported evidence. Respondents' self-serving statements, and their manufactured evidence (like Appendix A), are entitled to no deference to a court applying strict scrutiny.[9]

The Tenth Circuit erred in this case by applying the term "strong basis in evidence" so as to gut the hearsay rule by considering material (*e.g.*, Appendix A) that did not constitute a strong basis in evidence and apparently admitting it for the truth of the matter asserted (including the contents of the purported disparity studies cited therein).

The presumptions of social disadvantage are conclusive at least with respect to the Section 8(a) Program and, because it incorporates Section 8(a) presumptions and results, in the DBE Program. Regardless if conclusive or truly rebuttable, however, the presumptions confer a vast benefit on a sizeable portion of the U.S. population in an increasingly diverse society. Yet, there are no statistics as to how many individuals within the preferred groups are, in fact, discriminated against (much less discriminated against by governmental units sufficient to justify an exception to

[9] Respondents cannot rely on post-enactment evidence (*i.e.*, material that postdates the passage of an act) to attempt to satisfy, post-hoc, strict scrutiny. This Court has held that a governmental actor which wishes to use racial classifications "must ensure that, *before* it embarks on an affirmative-action program, it has convincing evidence that remedial action is necessary." *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (emphasis in original); *Croson*, 488 U.S. at 504.

the equal protection clause). Nor is there an explanation as to the precise reasons some of the groups have been included, and continue to be included, while others are excluded. The mere fact that the SBA has deemed them to be "subgroups" of the groups that Congress identified in 15 U.S.C. § 631(f) only begins the inquiry.[10] Without such statistics and detailed explanations (which the government cannot proffer), it is apparent that the preferred groups represent a random inclusion, designed and fostered in part for political purposes and bureaucratic convenience, not to remedy identified discrimination.[11]

The SBA sometimes even denied a petition filed on behalf of a group seeking a presumption of social disadvantage, only to grant that status subsequently. Such was the case with Tongans on whose behalf a petition was filed in 1986, which the SBA denied in 1987. *See* Lodged Doc. 8 (SBA-produced materials in *DynaLantic* concerning

[10] The presumption of social disadvantage inexplicably applies to some groups for which a history of discrimination is unlikely because they were barely present in the country until recently. *See* LaNoue, George R. and John C. Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 Journal of Policy History 439 (1994). *See generally* LaNoue, George R. and John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103 (2000).

[11] Despite the presumptions in Section 8(d), the House of Representatives admitted that some members of the designated racial and ethnic groups identified therein may not be disadvantaged in the business world. H.R. Rep. No. 949, 95th Cong., 2d Sess. 11 (1978). Yet Congress required prime contractors to consider all members of the identified groups to be socially and economically disadvantaged to ensure nationwide uniformity in the program and convenience. *Id.* On its face, that fact renders the presumptions infirm and unconstitutional. *See Croson*, 488 U.S. at 508; *Adarand*, 228 F.3d at 1177.

the petition and its denial; also on file with the agency). The SBA subsequently included Tongans by regulation in 1989.

Proof of gross statistical discrepancies in the industry can give rise to an inference of intentional discrimination but cannot prove discrimination in and of itself. *See Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 992 (1988) ("[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.").

Moreover, the fact that every minority group is treated as having been equally discriminated against (regardless of industry, geographic region, or other likely differentiating factors) show that no effort was made to tailor the remedy to provide relief for groups that allegedly have suffered identified discrimination in particular areas of American business. (That is, the programs treat African-Americans just like Asian Americans and just like Asian Indian Americans.) The end result is that the Programs do not, and cannot, apportion federal contract dollars only to those members of groups that have suffered discrimination in pertinent industries or to those industries where the requisite discrimination exists. *See O'Donnell Construction Co. v. District of Columbia,* 963 F.2d 420, 427 (D.C. Cir. 1992).[12] *See generally* SBA, Report to the U.S. Congress

[12] "[I]f the [minority] contractor is wealthy and has entered the mainstream of contractors in the community, a high bid [*i.e.*, losing bid] might not be traceable to the discrimination that a racial or ethnic classification is seeking to redress. Instead, such a bid might reflect an effort to exploit the classification." (footnote omitted). *See* W. Dellinger, Assistant Attorney General, Office of Legal Counsel, Memorandum to General Counsels, re: *Adarand*, published in *Daily Labor Rep.*, No. 125, at E-1, E-8 (June 29, 1995) (hereinafter, the "Dellinger Memo").

on Minority Small Business and Capital Ownership Development for Fiscal Year 1998 at 23 (showing widespread variation in contract actions and dollars by racial and ethnic groups). *See also Lee Testimony* at 109 ("I believe that SBA's inability (or unwillingness) to identify and graduate those 8(a) companies is a contributing factor to the concentration in the award of contracts."). The Tenth Circuit simply was incorrect in concluding that strict scrutiny does not require anecdotal and statistical evidence of discrimination for each racial and ethnic group receiving preferential treatment. *Adarand,* 228 F.3d at 1176, n.18. Far from "impart[ing] excess legitimacy to racial classifications," *see id.*, such a requirement is essential to curtailing the impermissible use of race.

It is axiomatic that before the government can use race, it must identify the discrimination with particularity. *Shaw,* 517 U.S. at 909; *Croson,* 488 U.S. at 504 (the government must identify the alleged discrimination, "public or private, with some specificity before they may use race-conscious relief."). There is no "compelling government interest" unless there is a "strong basis in evidence" of past discrimination in the relevant industry. *Croson,* 488 U.S. at 500. Contrary to the Tenth Circuit's decision (*see Adarand,* 228 F.3d at 1166-1167), there must be discrimination in the industry in question sufficient to justify race-conscious action (and not in procurement generally).

The government must make findings identifying specific discrimination by industry and region. *Croson,* 488 U.S. at 498 ("a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."); *Shaw,* 517 U.S. at 909 (specific discrimination "in a particular industry or region"); *O'Donnell Construction Co. v. District of Columbia,* 963 F.2d 420, 425 (D.C. Cir. 1992). In this case, that means the "construction subcontracting industry" in which Adarand operates. *See Adarand*, 228 F.3d at 1167-1168, 1173-1174. Findings that are not timely and not limited to the relevant industry category are of little value in demonstrating the existence of discrimination in that industry. *Croson*, 488 U.S. at 503. Thus, findings from twenty to thirty years ago are stale and offer no solace to Respondents. Indeed, if "amorphous" claims of past discrimination were sufficient, there would be no "logical stopping point to the use of racial preferences." *Croson,* 488 U.S. at 498-99, 505.

II. The Court Should Not Permit Respondents to Rely Upon Vague, Conclusory and Ill-Defined Allegations of "Passive Participation"

Respondents have not presented any evidence that the federal government has discriminated against minority contractors, in any industry. Indeed, the SBA has stated that it is unaware of any disparate treatment in connection with any federal procurement. *See* Lodged Doc. 9, interrogatory response, No. 8 at 55 (request 9) in *DynaLantic*. Nor is the SBA aware of any federal policy or practice that has or had a disparate impact on minorities' ability to compete for federal contracts and subcontracts

(even if such an impact somehow could establish discrimination or a strong basis in evidence). *See* Lodged Doc. 4, interrogatory No. 4, at 4-5, in *DynaLantic*.

Instead, the "evidence" proffered by the Respondents consists of the theory that the federal government is a "passive participant" in alleged discrimination in the construction industry – especially in the construction subcontracting industry in which Adarand operates. However, as with the term "strong basis in evidence," Respondents and the Tenth Circuit have misapplied the term "passive participation." In essence, without admitting as much, Respondents seek to define and use the term "passive participation" co-extensively with "societal discrimination" so that the exception swallows the rule and the use of race would be pervasive. The Court should not permit that sleight of hand.

An agency does not become a passive participant in private discrimination merely by awarding contracts to a market where a disparity between minority/non-minority contractors exists. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia,* 91 F.3d 586, 602 (3d Cir. 1996) ("[N]othing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations.") Instead, the agency must have affirmatively (if not intentionally) endorsed discrimination.

Under the justification that respondents and others proffer in support of race-based programs, there is an obvious and important difference between (1) seeking to prohibit and (if necessary) remedy specific practices of the

federal government where it unintentionally has provided financial assistance (directly or through states and localities) to prime contractors that engage in identified, intentional discrimination versus (2) seeking to remedy funding that has an alleged disparate impact because federal financial assistance is somehow "used" in an industry which purportedly exhibit the effects of discrimination. The DBE Program seeks to address that second situation and, thereby, attempts to remedy (if anything) societal discrimination. It is precisely for that reason that Appendix A lapses into a discussion of purported "evidence" of (a) barriers to minority contracting opportunities and the formation and development of minority businesses; and discrimination (b) by trade unions, employers, lenders, prime contractors and private sector customers, suppliers, business networks, and in access to contracting markets and bonding. The federal government, however, has strong and long-standing anti-discriminatory policies so that a federal contractor that might otherwise discriminate cannot do so. *See*, *e.g.*, Executive Order No. 11246 (1965).

Precisely *how* the federal government passively participates in private discrimination and the like, and the *effects* thereof, are noticeably absent from Appendix A. Moreover, DoJ acknowledges that *assuming these problems existed* it may not be sufficient to impose race-conscious programs outside of the industries that are allegedly discriminating (*e.g.*, in the credit industry).[13] Dellinger

[13] The Tenth Circuit relied heavily on such alleged financial discrimination and its alleged effect on minority businesses to conclude that Respondents could use race-based programs in the construction and construction subcontracting industries. *See Adarand*, 228 F.3d at 1169 ("The government evidence is particularly striking in the area of race-based denial of capital, without which the formation of minority subcontracting enterprises is stymied.").

Memo at E-33 ("[A] history of lending discrimination against minorities cannot serve as a catch-all justification for racial and ethnic classifications benefitting minority-owned firms through the entire economy; application of the narrow tailoring test would suggest that if lending discrimination is the problem being addressed, then the government should tackle it directly.")

The Tenth Circuit found, as the crux of passive participation and the government's strong basis in evidence, two types of discriminatory barriers:

> The first discriminatory barriers are due to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts.

Adarand, 228 F.3d at 1167-1168. There is no explanation of how the federal government "participated" (passively or otherwise) in this private discrimination.

The Tenth Circuit recognized that anecdotal evidence alone is insufficient to establish a compelling interest. *Adarand*, 228 F.3d at 1136 (citation omitted). Instead, there must be statistical evidence of a comparison of qualified, ready, willing, and able contractors to similar non-minority contractors (in this case, the "construction

subcontracting industry"). Numerical goals used in racial preferences must bear a meaningful relationship to the pool of qualified minorities. *Croson,* 488 U.S., at 501-502, 507.

Respondents also lacked (and still lack) such compelling statistical evidence. On June 30, 1998, the U.S. Department of Commerce ("DoC") published its so-called "benchmark study" (dealing with federal prime contracts) that purports to measure the "utilization" of SDBs against their predicted "capacity" (based on a mathematical model and regression analysis). *See* Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Federal Register 35713 (June 30, 1998). The benchmarks were created in an attempt to satisfy the narrow tailoring prong of strict scrutiny (and not to demonstrate compelling interest) and to, *inter alia*, justify the use of a ten percent price evaluation adjustment (increasing non-SDB bids by ten percent relative to SDB bidders). *See* 63 Federal Register at 35716.[14] Where there is alleged "underutilization" of SDBs (*i.e.*, a disparity between utilization and capacity) the government claims the effects of discrimination are present and government procurement officials can use certain race-conscious mechanisms. *See* 61 Federal Register at 26045. Among other flaws, the benchmark study does not disclose the alleged

[14] As originally conceived, the benchmarks also were to measure the utilization and capacity of SDBs "but for" discrimination. *See* Appendix A, 61 Fed. Reg. at 26045. However, that never occurred (*see* 63 Fed. Reg. at 35718 n.10), and it would be "'sheer speculation' to simply guess how many firms there would be absent past discrimination." *See Adarand,* 228 F.3d at 1163, 1174, *citing Croson*, 488 U.S. at 498, 499. Of course, the benchmarks are post-enactment "evidence" and cannot satisfy strict scrutiny.

"underutilization" for any racial or ethnic group but rather only for SDBs as a whole. More importantly, any statistical evidence that the federal government *itself* is discriminating is rebutted by the long-held policies *against* discrimination in federal procurement and an absence of any evidence that there has been widespread violation of these policies.

There are other fundamental flaws associated with the benchmark study that raise significant questions about the government's motivation and the rights of third parties.[15] However, for purposes of the present action, the benchmarks are significant for two reasons. First, they demonstrate that the government believes construction and construction subcontracting operate regionally and not nationally. *See* 63 Fed. Reg. at 35716, 36718 (June 30, 1998) (listing and discussing benchmark limitations for construction by region); *see also* Appendix A, 61 Fed. Reg. at 26045 ("[w]here data indicate, however, that an industry operates regionally, the benchmark limitations will be established by region."). Thus, according to the government, construction and construction subcontracting

[15] Those flaws are too numerous to present here. As an example, however, the benchmark study did not measure subcontracts. *See* 63 *Fed. Reg.* at 35716-35717 (discussing contract obligations awarded by the federal government). It is one reason for the infirmity of the study. *See* Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25648, 25651 (May 9, 1997) ("subcontracts ...must be counted as well."). Nevertheless, the federal government somehow believes that "utilization" and "capacity" of SDB subcontractors will mirror SDB prime contractors and, therefore, where there is no "underutilization" of SDB prime contractors there should be no "underutilization" of SDB subcontractors. *See* Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 71724 (December 29, 1998).

require regional findings of discrimination.

Second, according to the government, most of the areas for construction (including in particular for that corresponding to Colorado) do not show any alleged underutilization of SDBs. The federal government apparently has never published the purported "disparity" figures for the benchmarks in the Federal Register. However, they are included as Lodged Doc. 10. According to the government, SDBs are *overutilized* in the area that includes Colorado. *See* Lodged Doc. 10 (utilization and capacity, for the "mountain" region of construction, in SIC Code 15 are 27.2 and 22.1 percent, respectively; for SIC Code 16 are 27.0 and 13.3 percent, respectively; and for SIC Code 17 are 34.5 and 34.3 percent, respectively).[16]

According to the government's purported evidence, there is almost no aggregate disparity in the construction subcontracting industry with respect to states and localities. The Tenth Circuit concluded otherwise because it accepted the contents of Appendix A without conducting any independent investigation, as required by strict scrutiny, and thereby incorrectly stated that as a factual matter there is a 13% disparity between so-called minority enterprise "availability" and "utilization" in the overall construction subcontracting industry. *Adarand*, 228 F.3d at 1173-1174 (citing Appendix A and its reference to statistics in a report

[16] The overall calculations in the benchmark study show that the federal government is attempting to remedy disproportionality (however small). Indeed, some of the two-digit SIC Codes in the benchmark study show very little alleged disparity. *See* Lodged Doc. 10. Yet, the government uses race-conscious mechanisms even in those circumstances.

by the Urban Institute ("UI")). The appeals court relied on that purported "significant disparity as validation of the purported anecdotal evidence and of the Respondents' position." *Id.* Had the court conducted a proper analysis (or Respondents so disclosed), it would have known that a key piece of evidence cited in its opinion – the 87% figure in Adarand's subcontracting industry – was wrong.

Assuming somehow that the report was performed correctly, constituted a strong basis in evidence, and could be admitted for the truth of the matter asserted, UI only found a non-statistically significant disparity of 5% in the construction subcontracting industry regarding state and local awards. Enchautegui, María E., *et al.*, *Do Minority Owned Businesses Get A Fair Share of Government Contracts?* (the 1996 and 1997 versions are available at http://www.urban.org/authors/enchautegui.html) (collectively, the "*UI Report*"). The 87% figure, which was cited in Appendix A, came from a document that DoJ knew was a draft of the report. *See* Fed. Reg. at 26061 n.128 (discussing UI work performed "to date'). The number for construction subcontracting actually was 95%. *UI Report*, at Table II.1 and p. 19 (1996 report); Table 2.1 and p. 15 (1997 report). DoJ received a copy of the final report but did not mention the correct figure. *See* Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. at 25653.

In any event, as stated in its report, UI does not know the reason for any of the alleged disparities (whether in construction subcontracting, construction in general, or for any other of the examined areas) and notes that any number of factors could cause the alleged disparities. *UI Report* at ix (1996 version), at xiv (1997 version). Hence,

the report hardly constitutes "a strong basis in evidence" to use race in Adarand's industry.

Instead, the government's evidence raises troubling and lingering questions about the government's use of race, highlighting the need for exact and thorough judicial scrutiny which only can find that the DBE Program and the statutory and regulatory framework are unconstitutional.

CONCLUSION

The Court should reverse the judgment in favor of Respondents and enter judgment in favor of Petitioner.

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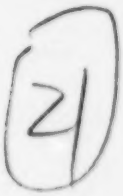

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Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amicus* 1

Summary of Argument 1

ARGUMENT –

I This Country Maintained A *De Jure* Racial Caste System That Brutally Enslaved African Americans For Over Two Hundred Years And For Nearly A Century Thereafter Deprived Them Of Fundamental Human And Civil Rights 3

A. The Founding Fathers, Congress, And This Court Sanctioned Slavery 4

B. The History Of The Fourteenth Amendment Demonstrates That The Drafters Intended It To Permit Race-Specific Measures 9

C. The Federal Government Maintained *De Jure* Racial Segregation And Discrimination After Reconstruction And Through The Mid-Twentieth Century 11

TABLE OF CONTENTS (continued)

Page

D. Federal Policies In The Twentieth Century Perpetuated The Status Of African Americans As Third-Class Citizens 15

E. Federal Government Policy Has Fostered Pervasive Racial Discrimination In The Construction Industry 20

II The Effects Of Government-Sanctioned Racial Oppression And Racial Caste Are Evident In The Continuing Economic And Social Disparities Between Blacks And Whites 24

Conclusion 29

TABLE OF AUTHORITIES

Page

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80 U.S. 581 (1872) 14

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347 U.S. 483 (1954) 2, 15

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Page

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Page

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U.S. Const. art. V 4n

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Page

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS*

Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and various areas of affirmative action. LDF believes that its experience in and knowledge gained from such litigation will assist the Court in this case.

Summary of Argument

For hundreds of years, blacks were systematically and violently deprived of the rights and privileges of full citizenship reserved for white men since this country's founding. The adoption of the Fourteenth Amendment in 1868 offered new hope that blacks would enjoy rights long afforded to whites. This promise however, was short-lived.

Following only a decade of Reconstruction, the federal government abandoned the guarantees of the Fourteenth Amendment and its role of protecting newly freed blacks. Instead, it left in place a racially tiered society that continued to privilege whites, and white men in particular, and to deprive generations of blacks of social, political, and economic capital. The most pernicious aspects of this racial caste system were

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*Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

prevalent not just in the South but throughout the country. The exclusion of blacks from the economic mainstream cemented the effects of slavery and the "separate but equal" doctrine sanctioned by this Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896). As such, by the time this Court finally ended the scourge of legally sanctioned apartheid in *Brown v. Board of Education*, 347 U.S. 483 (1954), official governmental policy had already established a system that subjugated black citizens much as slavery had done to their ancestors a century before.

The continuing effects of this pervasive racial subordination are evident in the severely depressed socioeconomic standing of the vast majority of blacks. The structural inequalities that social scientists have found limit the educational, employment, and asset-building opportunities of African Americans today are directly and powerfully rooted in this country's long-maintained, governmentally sanctioned discriminatory policies and customs. They are not vestigial, attenuated remnants of amorphous "societal discrimination."

The barriers faced by African Americans, as a class, who seek to establish construction businesses and obtain contracts, are thus very different in nature, origin and intensity from those that may be encountered by individuals of different backgrounds, contrary to Petitioner's suggestion. The Fourteenth Amendment authorizes race-conscious remedies that redress the cumulative effects of centuries of government-sanctioned discrimination against blacks and the exclusion of blacks from the economic mainstream. The Department of Transportation's Disadvantaged Business Enterprise program, therefore, serves the compelling governmental interest of remedying this country's incontrovertible history of racial oppression and of fulfilling the unfinished promise of the Fourteenth Amendment.

ARGUMENT

I. This Country Maintained A *De Jure* Racial Caste System That Brutally Enslaved African Americans For Over Two Hundred Years And For Nearly A Century Thereafter Deprived Them Of Fundamental Human And Civil Rights.

Race has been a critical dividing line in American society since the earliest days of colonial settlement. Nearly four centuries ago, blacks were kidnaped and forcibly brought to this country to be sold into slavery. For two and a half centuries, African Americans were held in slavery and deprived of the most basic human rights.[1] There can be no meaningful evaluation of the need for race-conscious remedial measures without first understanding the fundamental role that slavery, racial segregation, and pervasive racial discrimination by public and private actors have played in denying generations of blacks social, political, and economic opportunity while simultaneously conferring significant advantages on whites. "[B]ecause there was slavery . . . because the vision of others was shaped by slavery, and because most African Americans still experience unpleasant reminders that we are the descendants of those who were enslaved," we must understand and acknowledge the legacy of slavery until it ceases to

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[1] Although well documented, the deplorable status of slaves in American history bears repeating. Slaves were denied any form of education and, in many states, were legally forbidden to learn how to read. They had no right to vote, to participate in any political activities, to marry, or to contract out their services. As property, they could be bought, sold, leased, and seized on the whim of their owner. Masters had almost total discretion in exacting punishment, and many slaves endured brutal beatings. *See generally*, JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (4th ed. 1974); RICHARD KLUGER, SIMPLE JUSTICE 27 (1975).

"constrict the freedom and opportunities of African Americans."[2]

A. The Founding Fathers, Congress, And This Court Sanctioned Slavery.

The Founding Fathers established a government that sanctioned the wholesale denial of elemental human rights to blacks. As Frederick Douglass stated, the United States Constitution "was made in view of the existence of slavery, and in a manner well calculated to aid and strengthen that heaven-daring crime."[3]

During the Constitutional Convention of 1787, the Founding Fathers legitimized and secured the institution of slavery by including several clauses that sanctioned the practice. The Constitution treated a slave as three-fifths of a person for purposes of apportioning Congressional representatives and taxes among the States.[4] The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves would not end before 1808, and a provision prohibiting the amendment of that clause.[5]

The Founding Fathers included a number of clauses that

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[2] Mary Frances Berry, *Slavery, the Constitution, and the Founding Fathers: The African American Vision, in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION 11, 19 (John Hope Franklin & Genna Rae McNeil, eds., 1995); *see also* Henry Louis Gates, Jr., *Editorial, The Future of Slavery's Past*, N.Y. TIMES, July 29, 2001, § 4, at 15 ("Western regrets about slavery have a different character because here the responsibility for slavery is carried forward from past to present in the form of wealth. Slavery is embedded in American prosperity.").

[3] Berry, *supra* n.2, at 14 (quoting Frederick Douglass, *The Constitution and Slavery*, N. STAR, Mar. 16, 1849).

[4] U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV; U.S. CONST. art. I, § 8, *amended by* U.S. CONST. amend. XVI.

[5] U.S. CONST. art. I, § 9; art. V.

were instrumental in maintaining the institution of slavery. The Fugitive Slave Clause, for example, provided for the capture and return of slaves to their masters.[6] Other provisions called on the federal government to protect the states from domestic violence, such as slave rebellions, and required Congress to call forth the militia to suppress such insurrections.[7] Further, the Constitution prohibited taxes on the exports produced by slaves.[8] In addition, the electoral college provision on its face gave whites in slave states a disproportionate influence in presidential elections, because it counted nonvoting slaves in apportioning representatives to the electoral college.[9] Moreover, none of these provisions could be amended without the agreement of three-quarters of the states.[10] Such provisions clearly show that the Founding Fathers firmly intended to leave intact a system in which blacks were the chattel of whites.

Congress passed laws that further strengthened the institution of slavery.[11] In 1793 and 1850, Congress enacted fugitive slave laws that empowered the federal government to apprehend fugitives and offered no protection against enslavement to northern blacks who had been born free.[12] Nearly "every free

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[6] U.S. CONST. art. IV, § 2, *affected by* U.S. CONST. amend. XIII.

[7] U.S. CONST. art. IV, § 4; U.S. CONST. art. I, § 8.

[8] U.S. CONST. art. I, § 9.

[9] U.S. CONST. art. III, § 1.

[10] Berry, *supra* n.2, at 11-12.

[11] Subsequent Congressional legislation enabled the westward expansion of slavery. The Kansas-Nebraska Act, enacted in 1854, permitted slavery to extend north of the region previously protected from slavery by the Missouri Compromise of 1820. DICTIONARY OF AFRO-AMERICAN SLAVERY 381 (Randall M. Miller & John D. Smith eds., 1988).

[12] An alleged owner need only bring the purported fugitive before any federal or state court and, upon proof of identity, the "fugitive" would be

person of color was in imminent danger of being taken up and placed in slavery with no opportunity whatever to establish a valid claim to freedom."[13]

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turned over to his captor. Proof of identity could be fulfilled by oral testimony. There was no provision for a trial or for the alleged fugitive to testify on his or her own behalf. DICTIONARY OF AFRO-AMERICAN SLAVERY 275. The Fugitive Slave Act of 1793 also exacted a $500 penalty for concealing or obstructing the arrest of an escaped slave. *Id.* The Fugitive Slave Act of 1850 created a "commissioner" who was authorized to issue warrants entitling the captor to remove fugitives to the South. As an incentive to capture blacks and force them into bondage, commissioners were paid $10 each time they authorized the removal of a fugitive and only $5 when they found that the person seized was not a fugitive slave. *Id.*

[13] John Hope Franklin, *Race and the Constitution in the Nineteenth Century, in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION 21, 25 (John Hope Franklin & Genna Rae McNeil eds., 1995). Although blacks suffered from virulent racism in the South, it would be a mistake to conclude that other parts of the country were immune from racial oppression. Discrimination was rampant in all facets of Northern society, including housing, public transportation, and public venues, such as stores, restaurants, and hotels. The prospects of northern blacks were grim:

> Most free blacks . . . lived along the docks and wharves and in alleys. . . . [W]hites herded blacks into groups and pointed to the city limits. [Newly arrived] immigrants . . . cracked their skulls and burned their homes and churches. Some whites said openly that the only solution to the "Negro problem" was the "Indian solution." . . . "It would be better to kill them off at once, for there is no other way to get rid of them." . . . "We know how the Puritans did with the Indians, who were infinitely more magnanimous and less impudent than the colored race."

LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 180, 181 (5th ed. 1982). Thus, "[s]tanding outside the pale of justice, enslaved in the South, despised in the North, nineteenth-century blacks tasted the dregs of bitterness." *Id.*

Racial caste was also explicitly enforced in the area of education. In *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), the Massachusetts Supreme Court upheld school segregation for white and black children as a valid exercise of legislative power. Indeed, segregation was practiced in the public school systems of Delaware, Illinois, Indiana, and Ohio.

In addition to the scourge inflicted on free blacks by the Fugitive Slave Acts, federal and state governments enacted laws to prevent free blacks from enjoying any of the rights and privileges of citizens. The Naturalization Act of 1790, for example, barred free blacks from becoming naturalized citizens.[14] Four states — Indiana, Illinois, Iowa, and Oregon — closed their borders to blacks altogether.[15] In the Washington and Indiana territories, Congress denied free blacks the right to vote. Franklin, *supra* n.13, at 24. The individual states followed suit: every state that entered the Union after 1800, with the exception of Maine, restricted the right to vote to white males. *Id.* at 26-27. Likewise, the Second Congress passed a law establishing a uniform militia throughout the United States, but limited enrollment to white male citizens. *Id.* at 23.

This Court facilitated the institutionalization of slavery through a succession of cases in the early nineteenth century that confirmed the status of blacks as mere property, *see, e.g.*, *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), and solidified Congress's authority "to secure to the citizens of the slaveholding States the complete right . . . of ownership in their slaves." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842). The power over fugitive slaves, this Court concluded, "was so vital to the preservation of . . . domestic . . . institutions, that it . . . constituted a fundamental article without . . . which

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SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES 71, 141, 157-65, 504-06, 510-11 (Bernard D. Reams, Jr. & Paul E. Wilson eds., 1975). Iowa, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania did not require racial segregation in the schools as a matter of law but allowed localities to educate blacks and whites separately. *Id.* at 174-75, 276, 296, 399, 410-14, 418, 538-39.

[14] Franklin, *supra* n.13, at 23.

[15] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 26 (1988).

the Union could not have been formed." *Id.* Other cases held that a person could be liable for damages to a slave owner if caught harboring fugitive slaves, even if the person had no actual notice that the harbored persons were slaves. *See Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847).

Perhaps the most notorious and insidious of these cases was *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* solidified the wretched standing of African descendants and obliterated any meaningful distinction between the "rights" of free blacks and slaves. The Court concluded that blacks were not intended to be included as citizens but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ." *Id.* at 407. In its ruling, seven members of the Court recognized and upheld the racial caste system in the United States, where no person of African descent, free or slave, would be afforded the most basic rights. Until the ratification of the Fourteenth Amendment in 1868, blacks could claim no rights of citizenship long afforded whites as a matter of course.[16]

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[16] Whites created ever more ingenious means of oppressing blacks. Anti-miscegenation laws prohibited the inter-marriage of blacks and whites to protect, according to Benjamin Franklin, the purity of "the lovely White." RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 109 (1993). An ideology of blacks as inferior, "naturally lazy," and "childlike" was developed to justify racial segregation. In Philadelphia, Dr. Samuel Morton announced that the skulls of whites had a larger cranial capacity and, therefore, that whites were more intellectually capable. *Id.* at 108; *see also* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 50-72 (1981). In the North, blacks were commonly regarded as criminals, causing some states to restrict their migration. Ohio and Indiana, for example, "required entering blacks to post a $500 bond as a guarantee against becoming a public charge and as a pledge of good behavior." TAKAKI, *supra*, at 109. This view of black criminality is strikingly similar to the

B. The History Of The Fourteenth Amendment Demonstrates That The Drafters Intended It To Permit Race-Specific Measures.

The Congress that authored the Fourteenth Amendment recognized that race-conscious governmental policies were not only permissible but clearly necessary to redress the economic and social devastation that for centuries had been visited upon African Americans. Preceding the ratification of the Amendment in 1868, Congress enacted a series of race-specific social welfare laws for blacks,[17] and legislation which, though facially race neutral, was clearly intended to benefit blacks.[18] These measures were required to ameliorate the effects of the "Black Codes" that were adopted by southern states to tyrannize and oppress African Americans.[19] CONG. GLOBE, 39th Cong., 1st

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views that have spawned widespread "racial profiling" in today's society, including assumptions that blacks are engaged in criminal behavior. *See, e.g.,* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U .L. REV. 956 (1999).

[17] *See* Jed Rubenfeld, *Essay: Affirmative Action*, 107 YALE L.J. 427, 429-31 (1997).

[18] *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

[19] These "Black Codes" were startling in the breadth of restrictions imposed on the newly freed blacks. Among such state legislation were bills in South Carolina "making . . . freedmen servants [and] providing that the persons for whom they labor shall be their masters, [and] that the relation between them shall be the relation of master and servant"; and in Georgia, requiring that servants work from "sunrise to sunset," and providing that wages would be "forfeited by leaving," that the employer could "discharge servants for disobedience, drunkenness, immorality, or want of respect,"and that a $500 fine or four-month prison sentence could be imposed on a servant who left or on any person who "entic[ed] servants away." CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS DEBATES 95 (Alfred Avins ed., 2d ed. 1974). Mississippi and Louisiana had proposed similar legislation intended to strip blacks of all economic rights and social and political standing. *Id.* These extraordinarily

Sess. 39 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS DEBATES 95 (Alfred Avins ed., 2d ed. 1974).

There is significant evidence that a major reason for the adoption of the Fourteenth Amendment was to ensure constitutional support for the race-conscious legislation passed by Congress.[20] Such legislation embraced a variety of race-specific programs targeted for blacks. Congress enacted laws appropriating funds for "the relief of destitute colored women and children,"[21] for "colored" persons in the District of Columbia,[22] and for black Union soldiers.[23] The Freedmen's Bureau Acts adopted by the Reconstruction Congress also authorized relief for blacks, including "provisions, clothing, and fuel" and the sale of up to forty acres for refugees and freedmen.

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harsh and punitive working conditions were "enforced by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever." FONER, *supra* n.15, at 203.

[20] *See generally* Schnapper, *supra* n.18, at 784-88; *see also* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 20, 94-95 (1908); ALFRED H. KELLY ET AL., 2 THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 332-33 (7th ed. 1991); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L.REV. 1060, 1114 (1991).

> The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt . . . [T]he new amendment was written and passed, at the very least, to make certain that that statutory plan was constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive provisions in the Constitution.

JACOBUS TENBROEK, EQUAL UNDER LAW 201, 203 (1965).

[21] Rubenfeld, *supra* n.17, at 430 (citing Act of July 28, 1866, ch. 296, 14 Stat. 310, 317).

[22] *Id.* at 431 (*citing* Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20).

[23] *Id.*

Schnapper, *supra* n.18, at 760. Later legislation reauthorizing the Freedmen's Bureau provided more explicit protection and aid for free blacks, *id.* at 772-73, while limiting the Bureau's authority to aid white refugees, *id.* at 772.

This legislative history illustrates that the drafters — who considered and squarely rejected opposition to Freedmen's Bureau legislation on the grounds that such statutes excluded whites — could not have intended to bar race-specific measures under the Fourteenth Amendment.[24] This is confirmed by early decisions of this Court, which recognized that the "one pervading purpose" of the Reconstruction Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[25] *The Slaughter House Cases*, 83 U.S. 36, 71 (1873); *see also Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 398 (1978) (Marshall, J. dissenting); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

C. The Federal Government Maintained *De Jure* Racial Segregation And Discrimination After Reconstruction And Through the Mid-Twentieth Century.

The hope that Reconstruction would finally unshackle African Americans and place them on an equal social, political, and economic footing soon faded. After barely a decade of Reconstruction, the federal government withdrew from its role

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[24] *See generally* Schnapper, *supra* n.18.

[25] Although the Court did not suggest that only African Americans were protected by the Fourteenth Amendment, it nonetheless recognized that the "pervading spirit" and purpose of that Amendment was to remedy the evil of slavery. *The Slaughter House Cases*, 83 U.S. 36, 71-72 (1873).

of protecting the newly-freed blacks.[26] The Hayes-Tilden Compromise of 1877 resulted in the withdrawal of Union troops from the South and removed "the last military obstacle to the reestablishment of white supremacy there."[27] Southern whites — determined to reassert their dominance over blacks — launched massive campaigns of intimidation and terror throughout the South.[28]

Early efforts to secure white hegemony focused on depriving

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[26] Frederick Douglass eloquently stated the position of African Americans at the close of the nineteenth century: "So far as the colored people of the country are concerned, the Constitution is but a stupendous sham . . . keeping the promise to the eye and breaking it to the heart. . . . They have promised us law and abandoned us to anarchy." Berry, *supra* n.2, at 15 (quoting Frederick Douglass, *Speech on the Occasion of the Twenty-Fourth Anniversary of Emancipation in the District of Columbia, Washington D.C., 1886, in* THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 431 (Philip S. Foner ed., 1955)).

[27] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 200 (1980).

[28] MARY FRANCES BERRY, BLACK RESISTANCE/WHITE LAW 72-79, 81 (2d ed. 1996). From Emancipation through the mid-twentieth century, the lynching of blacks was a common practice. More than 10,000 lynchings occurred between 1878 and 1898 alone. Bennett, *supra* n.13, at 258. It was not unusual for a paper to advertise a lynching and for crowds to come on chartered trains. *Id.* at 271; *see also generally* RALPH GINZBURG, 100 YEARS OF LYNCHINGS (1988); WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000) (graphic description and illustration of disturbing and barbaric nature of lynchings.). The overwhelming majority of blacks lynched were charged with "crimes" such as "testifying against whites in court, seeking another job, using offensive language, failing to say 'mister' to whites, disputing the price of blackberries, attempting to vote and accepting the job of postmaster." Bennett, *supra* n.13, at 271. Far from condemning the lynching of blacks, many presidents, including Franklin Delano Roosevelt, "passively accepted lynching as a normal part of life." Matthew Holden, Jr., *Race and Constitutional Change in the Twentieth Century*, AFRICAN AMERICANS AND THE LIVING CONSTITUTION, 117, 131 (1995).

blacks of their right to vote. With the acquiescence of the national government, blacks were defrauded and intimidated at the polls. Berry, *supra* n.2, at 81-83. State legislatures adopted voting requirements, such as poll taxes and literacy tests, which had the purpose and effect of further disenfranchising blacks.[29] The advent of the all-white Democratic primary in southern states dominated by the Democratic party guaranteed white supremacy by completely denying blacks political participation.[30] As black disenfranchisement spread throughout the South, blacks' modest political gains were quickly eroded.[31] Blacks were completely deprived of any voice in federal, state, or local government. The effects of the denial of black suffrage were far-reaching. Blacks lacked the power to vote out governments that imposed rigid segregation and that denied them government resources.

Decisions by this Court foreshadowed the government's massive retreat from the guarantees of the Fourteenth Amendment and further betrayed black aspirations of equality. *See, e.g., James v. Bowman*, 190 U.S. 127 (1903); *United States*

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[29] A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 173 (1996); *see also* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 41-45, 67-70, 104-06, 136-38, 157-58, 192-96, 233-35, 271-73 (Chandler Davidson & Bernard Grofman eds., 1994). As one Mississippi judge candidly commented, "there has not been a full vote and a fair count in Mississippi since 1875 . . . we have been preserving the ascendancy of the white people by . . . stuffing ballot boxes, permitting perjury and . . . carrying the elections by fraud and violence." *Id.* at 174.

[30] Higginbotham, *supra* n.29, at 166-67.

[31] Black officials, elected for the first time during Reconstruction, lost their seats. Such black political representation would not be seen again for nearly a hundred years in states such as Georgia, North Carolina, and Louisiana. Other states, such as Texas and Florida, would not witness the election of *any* black representative for the next century. Higginbotham, *supra* n.29, at 128-29 (text accompanying photographs).

v. Harris, 106 U.S. 629 (1883); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Blyew v. United States*, 80 U.S. 581 (1872). Most notorious among these decisions were *The Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *The Civil Rights Cases*, the Court declared unconstitutional the Civil Rights Act of 1875 which had outlawed racial segregation in public accommodations. The opinion, authored by Justice Bradley, concluded that the "private wrong" of racial discrimination in public accommodations was beyond the reach of the Fourteenth Amendment. The illogic of Bradley's opinion could not be more apparent: after two centuries of the systemic oppression and subjugation of blacks in which state and federal resources were used to perpetuate the institution of slavery, this Court determined that a remedy for such deeply rooted injustice was beyond its power. Bradley's opinion fully illustrates the extent to which this Court blinded itself to the exceedingly sorry plight of the newly-freed blacks:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

109 U.S. at 25. In *Plessy v. Ferguson* this Court placed its *imprimatur* on the "separate but equal" doctrine and enshrined a government-sanctioned racial caste structure for another two generations. 163 U.S. 537 (1896). Disregarding the history and purpose of the Fourteenth Amendment and this country's entrenched racial hierarchy, this Court concluded:

> [A] statute which implies merely a legal distinction between the white and colored races — a distinction which is founded

> in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races.

163 U.S. at 543. *Plessy* marked the formal demise of the government's short-lived efforts to right deeply rooted wrongs against blacks. It would not be until *Brown v. Board of Education*, decided nearly sixty years and two generations later, that this Court would take a decisive step to rectify this country's long legacy of racial persecution.

D. Federal Policies In The Twentieth Century Perpetuated The Status Of African Americans As Third-Class Citizens.

Twentieth-century governmental policies — both before and after *Brown* — have perpetuated the legacy of slavery and state-sanctioned segregation and discrimination by erecting barriers that depressed black economic advancement and that substantially eliminated opportunities for generations of blacks to amass personal and familial assets. Even with the hard fought victory of *Brown* and the end of *de jure* segregation in public schools, blacks continued to suffer the frontal effects of federal policies designed to ensure their status as third-class citizens.[32]

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[32] In the racial pecking order, this country has reserved a peculiar form of hostility for blacks even beyond that directed against most disenfranchised racial and ethnic minorities. Although "white ethnics often experienced severe hardship due to unjust treatment, they also benefitted from the far more pervasive and brutal discrimination" against blacks. Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, 12 J. OF INTERGROUP REL. 6 (Winter, 1984). Unlike immigrants, "[t]he vast majority of [blacks] . . . arrived not on immigrant ships, but on slave ships." Aleinikoff, *supra* n.20, at 1124. "[W]hen the ingenious American devices for excluding blacks from society are contrasted with the assimilationist welcome accorded immigrants, one can quickly . . . formulate a sensible answer to the question

For the first third of the century, the majority of blacks lived in a plantation economy that was "essentially feudalistic."[33] As sharecroppers and tenant farmers, blacks were trapped in an economy that required them to pay more than they earned, and therefore they lived in "perpetual indebtedness [that kept] the tenant farmer nearly . . . as securely tied to the land and to his landlord as he was under slavery."[34] Even here, blacks were paid less than whites and, consequently, were less able to escape the system.[35]

Although conceived to promote the general social welfare, New Deal economic programs imposed serious barriers to black economic advancement. Provisions of the Social Security Act, insisted upon by southern Congressmen,[36] for more than two decades excluded domestic servants and agricultural workers from old-age pension coverage and unemployment benefits — the core programs of the Social Security Act. The racial effects of this exclusion were dramatic. More than 60% of the excluded workers were African-American, and "in the cotton states of the Deep South (Mississippi, Alabama, Georgia and South Carolina) more than three in four excluded workers were

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that lies deep in many white minds: why can't blacks do what my immigrant ancestors did?" *Id.*

[33] Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1347 (1987). *See also*, William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31 (1976) (describing series of state laws in effect as late as 1930s and 1940s that limited economic freedom of blacks in the South).

[34] Linder, *supra* n.33, at 1349.

[35] *Id.* at 1347.

[36] JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 134 (1988). *See also* ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE 24-25, 39, 59-60 (1998); JILL QUADAGNO, THE COLOR OF WELFARE 21 (1994).

black."[37] For similar reasons, another New Deal measure that brought a measure of economic security to many Americans omitted large numbers of blacks. When Congress adopted the Fair Labor Standards Act in 1938, it incorporated the same agricultural and domestic worker exemptions as featured in the Social Security Act.[38]

With the support and encouragement of state and local actors,[39] the federal government adopted policies that severely limited black home ownership opportunities, thereby depriving blacks of one of the most effective routes to personal and family wealth accumulation.[40] For decades beginning in the 1930s the Federal Housing Administration ("FHA") actively fostered residential segregation.[41] Even after restrictive covenants were outlawed by this Court in 1948,[42] the FHA overlooked devices adopted by neighborhood organizations and private citizens that accomplished the same discriminatory ends as the restrictive

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[37] Lieberman, *supra* n.36, at 44.

[38] Linder, *supra* n.33, at 1351-53.

[39] See generally Yale Rabin, *The Roots of Segregation in the Eighties: The Role of Local Government Actions, in* DIVIDED NEIGHBORHOODS 208-26 (Gary A. Tobin ed., 1987).

[40] MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 16 (1995).

[41] The racially discriminatory practices and mortgage insurance policies of federal agencies, including the FHA, the Veterans Administration, and the Federal Home Loan Bank Board are well documented. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196-218 (1985); Glenda G. Sloane, *Creative Financing and Discrimination: Discrimination in Home Mortgage Financing, in* A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 85-87 (United States Civil Rights Commission ed., 1983); Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 POL. SCI. Q. 784-90 (1974-75).

[42] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

covenants.[43] These discriminatory practices, and similar practices by the Veterans Administration, excluded African Americans from major federal housing support programs. FHA deputy commissioner Philip Maloney reported in 1967 that in "a number of large urban centers . . . virtually no minority family housing has been provided through FHA."[44]

The FHA also institutionalized overtly discriminatory lending practices that denied black families the opportunities to buy homes and accumulate equity.[45] It defined "incompatible racial elements" as grounds for rejecting a mortgage and encouraged appraisers to rely upon physical barriers or racial covenants to guarantee against the encroachment of "inharmonious racial groups."[46] Redlining practices by the FHA and the Federal Home Loan Bank Board continued through the 1970s. Private banks and savings-and-loan associations patterned their lending policies on the discriminatory practices of the FHA, extending the reach of federal policy deep into the private sector. Moreover, these private practices continued into the 1990s. Comparably qualified black families are still rejected for home loans 60%

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[43] Orfield, *supra* n.41, at 788.

[44] *Id.* at 789 (citing CONG. REC.S15456 (1967)).

[45] *See* JACKSON, *supra* n.41, at 213-14.

[46] Orfield, *supra* n.41, at 786. For example, the FHA in Detroit in 1940 required a developer to construct a six-foot-high, foot-thick wall extending nearly a half-mile to assure the "stability" of a white neighborhood being built adjacent to a black neighborhood. Thomas J. Sugrue. *The Structures of Urban Poverty, in* THE UNDERCLASS DEBATE 113 (Michael B. Katz ed., 1993). Federal public housing policies have also fostered racial segregation. From the outset of public housing during the New Deal era, the federal government deferred to local officials on the location of public housing units. Faced with local resistance to building in predominantly white areas, federal officials sited public housing in predominantly black, economically depressed neighborhoods, a pattern that continues to the present. Sloane, *supra* n.41, at 85-87.

more often than white families.[47] Federal regulators acquiesced in this discriminatory conduct throughout the 1970s and 1980s.[48]

Federal "urban renewal" policy devastated black urban areas. "Slum clearance," officially introduced in 1949, diminished available housing for African-Americans[49] and ripped apart black neighborhoods by destroying local businesses.[50] Along with federal public housing policy that concentrated African Americans in racially isolated, economically depressed areas, urban renewal policies destabilized inner cities, setting in motion a downward economic spiral that further limited blacks' access to capital. Perhaps nowhere are the deleterious ripple effects of these policies more apparent than in the devastation of largely black inner-city urban areas, including severe economic underdevelopment, substandard schools, limited housing, rampant unemployment, and a paucity of jobs that pay a livable wage.[51] The deep involvement of the federal government in these policies not only reinforced previous patterns but lent them "a permanence never before seen," one

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[47] Melvin L. Oliver & Thomas M. Shapiro, *Wealth and Racial Stratification, in* 2 AMERICA BECOMING 241 (Neil J. Smelser et al. eds., 2001). *See also* William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735 (1997-98) (on persistence of "redlining" in closely-related property insurance industry) .

[48] Sloane, *supra* n.41, at 85-87.

[49] *See, e.g.*, Orfield, *supra* n.41, at 787 (citing NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 163 (1968)).

[50] *See, e.g.*, John F. Bauman, Norman P. Hummon & Edward K. Muller, *Public Housing, Isolation and the Urban Underclass, Philadelphia's Richard Allen Homes, 1941-1965*, 17 J. OF URB. HIST.281 (1991).

[51] *Id.* at 286. The federal highway program, which facilitated suburban expansion, also contributed to racial isolation in major urban areas. Rabin, *supra* n.39, at 208, 211.

that "virtually constituted a new form of de jure segregation."[52] The passage of otherwise landmark civil rights legislation has failed to ameliorate the widespread and deeply rooted effects of longtime government policies devised to oppress blacks and to subvert black achievement.[53]

E. Federal Government Policy Has Fostered Pervasive Racial Discrimination In The Construction Industry.

The federal government has perpetuated a highly racially stratified construction industry by protecting segregated trade unions and, in effect, barring blacks from obtaining positions as skilled craft laborers and ultimately positioning themselves to advance in the industry. In the early and mid-twentieth century, black migrants from the South were excluded from all but the

[52] ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 254-55 (2d ed. 1998).

[53] For example, despite the passage of the Fair Housing Act in 1968 and an amended version in 1988, enforcement of housing anti-discrimination laws continues to be inadequate. *See* United States Commission on Civil Rights, *The Fair Housing Amendments of 1988: The Enforcement Report* 5 (1988); Gary Orfield, *Segregated Housing and School Resegregation, in* DISMANTLING DESEGREGATION 299 (Orfield et al. eds., 1996); John Yinger, *The Racial Dimension of Urban Housing Markets in the 1980s, in* DIVIDED NEIGHBORHOODS 64 (Gary A. Tobin ed., 1987). Enforcement of employment anti-discrimination laws has also been severely limited by lack of government resources, *see* M. Bendick *et al.*, *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. OF BLACK POL. ECON. 32 (1994); Reed Abelson, *Anti-Bias Agency is Short of Will and Cash*, N.Y. TIMES, July 1, 2001, at A12, and deficiencies in Title VII's enforcement scheme. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 55-56 (1992); Stephen J. Schwab, *Employment Discrimination, in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 588-89 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 279 (1995); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L. J. 1, 64 (1996); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 479 (1995).

most menial construction jobs in the North despite their extensive experience in carpentry and masonry.[54] When blacks began to make inroads in construction, Congress intervened to protect white union members against wage competition from black workers by enacting the Davis-Bacon Act. In the hearings that preceded passage of the Act, advocates for the legislation made repeated racial statements regarding southern workers brought north to work on federal projects.[55] In 1935, Congress acquiesced in and effectively sanctioned the racially exclusionary practices of labor unions when it rejected efforts to include anti-discrimination provisions in the National Labor Relations Act.[56] During the 1970s, federal officials "choreographed resistance to the desegregation of the construction industry."[57] As a result, racially discriminatory practices in construction are more "impregnably secure" than in perhaps any other institution in the United States.[58]

Such discrimination has impeded the entry of African Americans into the construction industry, either as employees or as self-employed business owners. Blacks are "persistently more under-represented among the ranks of self-employed persons in construction than they have been in traditionally discriminatory skilled crafts."[59] And this remains the case

[54] THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS, 115 (1996).

[55] David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276, 281-87 (1994).

[56] Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 HOUS. L. REV. 823, 851-52 (2000).

[57] Joshua B. Freeman, *Hardhats: Construction Workers, Manliness and the 1970 Pro-War Demonstrations*, 26 J. OF SOC. HIST. 737 (1993).

[58] *See generally* Hill, *supra* n.32.

[59] Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination*, 19 POL. & SOC'Y 292, 296 (1991). *See also* Helene Slessarev, *The Collapse of the Employment Policy*

despite two decades of affirmative action efforts in government contracting.[60]

These barriers are more than just those experienced by all newcomers to an industry, but rather are distinctly racial in character. In the late nineteenth and early twentieth century, "trade unions frequently were the instrument that forced black workers out of jobs they had traditionally held by replacing them with immigrant white workers after union organization."[61] The unions opposed inclusion of anti-discrimination measures in the National Labor Relations Act.[62] In 1969, white workers held raucous demonstrations to oppose desegregation efforts affecting building trades.[63] Resistance to desegregation continued through the middle and late twentieth century.[64]

For example, black enrollment in apprenticeship programs in Detroit declined between 1957 and 1966, with only 41 blacks enrolled as apprentices out of a total of 2,363, or 1.7% of the total.[65] Detroit's patterns were similar to those existing elsewhere.[66] In New York City, the construction business

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Agenda: 1964-1981, *in* DREAM AND REALITY: THE MODERN BLACK STRUGGLE FOR FREEDOM AND EQUALITY 115 (Jeannine Swift ed., 1991) (finding federal government's expenditure of over $4 million in subsidies between 1967 and 1970 for programs to recruit blacks for union apprenticeship programs failed to open doors for blacks in building trades).

[60] Hill, *supra* n.32, at 296.

[61] *Id.*

[62] Plass, *supra* n.56, at 850-53.

[63] Freeman, *supra* n.57, at 734.

[64] *Id.* at 737; Waldinger & Bailey, *supra* n.59, at 293-94.

[65] Sugrue, *supra* n.54, at 117.

[66] *Id.* at 116. One study found that according to the 1960 census, only 3.3% of all apprentices are black, while in California and New York, "the two largest and . . . most progressive states in the Union," the percentage

experienced a boom in the 1980s such that "the value of construction contracts doubled in real terms between 1976 and 1987, which in turn doubled the size of the local construction labor force."[67] However, this building boom "left black workers out in the cold."[68] During this period, black employment in construction declined almost 15 percent.[69] By the close of the 1980s, black underrepresentation in the industry and its skilled trades was worse than it had been in 1970.[70] Similar patterns existed in other major U.S. cities.[71]

Federal anti-discrimination laws have been ineffective in dealing with the pervasive discrimination in the construction industry. Many unions in the building trades successfully evaded laws barring employment discrimination despite decades of litigation.[72] The informality of the construction industry's personnel practices facilitates racial discrimination by "not only creat[ing] natural barriers to outsider groups," but also by "thwart[ing] public policies designed to counter discrimination."[73] Because the construction industry tends to be

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falls to 1.9 and 2.0 respectively." George Strauss & Sidney Ingerman, *Public Policy and Discrimination in Apprenticeship*, *reprinted in* NEGROES AND JOBS 299 (Louis A. Ferman ed., 1968).

[67] Waldinger & Bailey, *supra* n.59, at 292.

[68] *Id.*

[69] *Id.* at 296.

[70] *Id.*

[71] *Id.* at 294 ("A continuing history of racial conflict over construction jobs is one that New York shares with virtually all major cities.").

[72] Hill, *supra* n.32, at 39. *See also* Sugrue, *supra* n.54, at 116-17. One building-trades union has openly resisted state and federal anti-discrimination laws for nearly a half-century. *EEOC v. Local 638*, 81 F.3d 1162 (2d Cir. 1996); Hill, *supra* n.32, at 39.

[73] Waldinger & Bailey, *supra* n.59, at 293-94.

dominated by small firms that rely on social networks for hiring, enforcement against race discrimination tends to be more difficult and less effective.[74] Deep resistance to desegregation within the construction industry strongly demonstrates that only race-conscious relief can remedy the racial discrimination in the industry.[75]

II. The Effects Of Government-Sanctioned Racial Oppression And Racial Caste Are Evident In The Continuing Economic And Social Disparities Between Blacks And Whites.

Every major economic indicator demonstrates that African Americans continue to experience significant economic disparities compared to whites. In 1999, black median household income stood at only 63% of that of non-Hispanic whites.[76] Blacks earn less than whites in virtually every occupational group.[77] The unemployment rate for blacks is 2.4

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[74] *Id.*

[75] JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, DISCRIMINATION AMERICAN STYLE 51 (1978); WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS 281 (1977) ("Despite the multitude of plans and programs, not a great deal has been done to alter the institutional rigidity which limits Black access to construction jobs."); Waldinger & Bailey, *supra* n.39, at 314; Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 28 (1987).

[76] U.S. Census Bureau, *Median Household Income by Race and Hispanic Origin: 1967 to 1999*, <http://www.census.gov/hhes/income/income99/incxrace.html>; *see also* Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1 (Although 42% of whites believe that the average black earns as much as the average white, "[i]n fact, substantial differences persist between black and white earnings. The median household income for whites was $44,366 in 1999, compared with $27,910 for blacks.").

[77] U.S. Bureau of Labor Statistics, Office of Employment and Unemployment Statistics, Current Population Survey, *Usual Weekly*

times that of the white unemployment rate,[78] and blacks are twice as likely as whites to be in poverty.[79] African Americans lag far behind white Americans in overall wealth. For every dollar of wealth the median white household held in 1999, the median black household held 9 cents.[80] Net worth for the median black household declined between 1994 and 1999 while net worth for white households increased 20%.[81] African Americans are 2.3 times more likely to die in infancy than whites, are three times more likely to be below the poverty level than non-Hispanic whites, and have a lower life expectancy than whites.[82]

Black high school students drop out of school at 1.76 times

Earnings of Employed Full-Time Wage and Salary Workers by Occupation, Sex, Race and Hispanic Origin, 2000 Annual Averages, at 13-16, 25-28. While less than 30% of whites earn less than $25,000, almost half of all blacks in 1999 earned less than that. Morin, *supra* n.76, at A7.

[78] U.S. Bureau of Labor Statistics, *Household Data: Annual Averages, Unemployed Persons by Marital Status, Race, Age and Sex*, <ftp://ftp.bls.gov/pub/special.requests/lf/aat24.txt>.

[79] Morin, *supra* n.76, at A7.

[80] Joseph Lupton & Frank Stafford, *Household Financial Wealth, (Thousands of 1999 Dollars)*, Institute for Social Research (Jan. 2000) <http://www.isr.umich.edu/src/psid/wealthcomp.pdf>.

[81] Joseph Lupton & Frank Stafford, *Household Net Worth, (Thousands of 1999 Dollars)* Institute for Social Research (Jan. 2000) <http://www.isr.umich.edu/src/psid/wealthcomp.pdf>.

[82] Center on Budget and Policy Priorities, Analysis of Census Bureau's Income and Poverty Report for 1999 (2000) <http://www.cbpp.org/9-26-00pov.htm>; National Center for Health Statistics, *Estimated Life Expectancy at Birth in Years, by Race and Sex, (1999)* <http://www.cdc.gov/nchs/fastats/pdf/47_28t12.pdf>; Marian F. MacDorman & Jonnae O. Atkinson, *Infant Mortality Statistics from the 1997 Period Linked Birth/Infant Death Data Set*, 47 NAT'L VITAL STAT. REP. 2 (1999).

the rate of white students.[83] Black high school graduates are significantly less likely than their white peers to enter college within a year of graduation.[84] Even at the college level, racial differences in completion rates have increased since the early 1990s.[85] Despite increasing racial diversity in the country generally, the racial segregation of public schools has increased in the past decade.[86]

Black/white segregation in housing — the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and, ultimately, wealth[87] — "remains the most extreme" of all residential segregation.[88] "No other ethnic or racial group in the history of the United States has ever, even briefly, experienced such high levels of residential segregation."[89] Moreover, unlike the experience of other ethnic groups, segregation of African Americans is not

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[83] National Center for Education Statistics, Quick Tables & Figures, *Percentage distribution of 16- to 24-year olds who were not enrolled in school and had not completed high school, by race/ethnicity and recency of migration: 1997.* <http://nces.ed.gov/quicktables/>.

[84] *The Schooling of Black Americans, in* A COMMON DESTINY 378-79 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

[85] Rebecca M. Blank, *An Overview of Trends in Social and Economic Well-Being, by Race, in* 1 AMERICA BECOMING 26 (Neil J. Smelser, et al. eds., 2001).

[86] Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 14, 17 (2001).

[87] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS 235 (1993).

[88] Janny Scott, *Rethinking Segregation Beyond Black and White*, N.Y. TIMES, July 29, 2001, § 4, at 1, 6.

[89] Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas, in* 1 AMERICA BECOMING 399, 401 (Neil J. Smelser et al. eds., 2001).

explained by class — "no matter how socioeconomic status is measured, black segregation remains universally high."[90]

These disparities exist, in whole or in part, as a result of racial discrimination and its continuing effects.[91] Blacks experience persistent disparities in family income, a legacy of past [92] and present pervasive race discrimination in housing [93] and in the labor market.

In the labor market, African Americans continue to face the exclusionary barriers created by segregated social networks, information bias, and statistical discrimination.[94] All factors

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[90] Massey & Denton, *supra* n.87, at 88 (1992).

[91] *See, e.g., Overview: Then and Now, in* A COMMON DESTINY 50 (Gerald D. Jaynes & Robin M. Williams eds., 1989). A number of studies show a direct correlation between discrimination and the degree of racial segregation in different urban areas. Massey, *supra* n.89, at 419.

[92] David W. Bartelt, *Housing the "Underclass," in* THE UNDERCLASS DEBATE (Michael B. Katz ed., 1993).

[93] National studies have found pervasive racial discrimination in the sales and rental markets. Massey, *supra* n.89, at 418-20. A 1988 study concluded that African Americans and Latino Americans have at least a 50% chance of facing discrimination in the rental and sales markets. United States Commission on Civil Rights, *supra* n.53, at 1-2; *see also* Massey & Denton, *supra* n.87, at 99; A COMMON DESTINY, *supra* n.91, at 50 ("There is extensive documentation of the purposeful development and maintenance of involuntary residential exclusion and segregation. Residential segregation has not been an unplanned, spontaneous process, nor has it disappeared along with legal segregation."); Norman Fainstein, *The Underclass/Mismatch Hypothesis as an Explanation for Black Economic Deprivation*, 15 POL. & SOC'Y 403, 439-40 (1986-87) ("Combined with virulent racism in housing markets . . . outright discrimination along with more subtle forms of channeling in labor markets goes a long way toward explaining black economic disadvantage").

[94] Braddock & McPartland, *supra* n.75, at 27 ("Minorities face special difficulties in the employment process not only because they are victims of past discrimination in educational and occupational opportunities, but also

being equal, blacks on average are less likely to receive job offers than whites[95] and can expect to "sample about 50 percent more jobs than whites to get an offer."[96] Black applicants are also "much less likely to be hired by small establishments than large ones and are less likely to be hired for jobs that involve significant contact with white customers."[97] The greater the degree of informality and subjectivity in the hiring process, the greater the likelihood of discrimination.[98] Absent comprehensive federal government protection and regulations, "the prospects of suburban job opportunities for black workers are dismal at best" due to general white "aversion" against blacks.[99]

Distinct racial barriers have also limited the entrepreneurial opportunities of African Americans. While self-employment

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because of the specific barriers that qualified individuals often encounter at present because of their membership in a race or ethnic minority group."); *see also* MICHAEL FIX & RAYMOND J. STRUYK eds., CLEAR AND CONVINCING EVIDENCE (1992); Braddock & McPartland, *supra* n.75, at 5-39; Bendick, *supra* n.53; Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q.J. OF ECON. 835-67 (1998); Harry J. Holzer, *Why Do Small Establishments Hire Fewer Blacks than Large Ones?*, 33 J. OF HUM. RESOURCES 896-914 (1998).

[95] Harry J. Holzer, *Race Differences in Labor Market Outcomes Among Men, in* 2 AMERICA BECOMING (Neil J. Smelser et al. eds., 2001) 106; Fix & Struyk, *supra* n.94.

[96] Fix & Struyk, *supra* n.94, at 193.

[97] Holzer, *supra* n.94, at 106. *See also* Holzer, *supra* n.95, at 896-914; Holzer & Ihlanfeldt, *supra* n.94, at 835-67.

[98] Holzer, *supra* n.94, at 106; Braddock & McPartland, *supra* n.75, at 5-39; Holzer, *Informal Job Search and Black Youth Unemployment*, 77 AM. ECON. REV. 446-452 (1987).

[99] BRUCE WILLIAMS, BLACK WORKERS IN AN INDUSTRIAL SUBURB 193 (1987).

has been the key to economic success and wealth accumulation for many Americans, blacks "have faced levels of hardship in their pursuit of self-employment that have never been experienced as fully by or applied as consistently to other ethnic groups, even other nonwhite ethnics."[100] For many years during the first half of the twentieth century, many types of businesses were off-limits to African-Americans, and those African-American businesses that did exist were restricted to all-black segregated markets. Barriers to entry prevent blacks from competing in an open market. This has ensured "low levels of black business development and has kept black businesses relatively small."[101]

Conclusion

The barriers faced by African Americans, as a class, who seek to establish construction businesses and obtain contracts, are thus very different in nature, origin and intensity from those that may be encountered by Americans of different backgrounds, contrary to Petitioner's suggestion. While non-black persons or families may, on an individual basis, experience disadvantages that limit or impede their economic potential, this country's long-maintained, governmentally-sanctioned discriminatory policies and customs continue to this day to systemically impede access to the economic mainstream for blacks. Such racial disadvantage is not — as this Court has sometimes suggested — the vestigial, attenuated remnant of amorphous "societal discrimination," but has resulted from deeply rooted racial discrimination by federal, state, and local government actors as well as private individuals aided by discriminatory government policies.

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[100] Oliver & Shapiro, *supra* n.40, at 45.

[101] *Id.* at 47.

The powerfully entrenched disparities between blacks and whites that result, accompanied by ongoing racial discrimination, persist in making this country race-conscious, notwithstanding determined efforts by some to deny — in the face of every indication to the contrary — the continuing significance of race:

> The appeal of color-blindness is that it projects as moral what is not; by refusing to see and act on the reality of continued discrimination, the color-blind can project themselves as above the fray, unsullied by manipulations of color. This, of course, leaves the problem unsolved, and, even worse, ensures that the problem will be ignored."[102]

This Court should turn away from such a course and hold that the Fourteenth Amendment authorizes race-conscious remedies that redress the cumulative effects of centuries of government-sanctioned discrimination against blacks and the exclusion of blacks from the economic mainstream; and that the Department of Transportation's Disadvantaged Business Enterprise program, therefore, serves the compelling state interest of remedying this country's incontrovertible history of racial oppression and of fulfilling the unfinished promise of the Fourteenth Amendment.

For the foregoing reasons, the judgment of the court below should be affirmed.

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[102] Anthony Marx, *Racial Trends and Scapegoating: Bringing in a Comparative Focus, in* 1 AMERICA BECOMING 311 (Neil J. Smelser et al. eds., 2001).

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v.

NORMAN Y. MINETA,
SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THE DBE PROGRAM FURTHERS THE COMPELLING INTERESTS IN REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION IN THE CONSTRUCTION INDUSTRY AND PREVENTING THE GOVERNMENT'S SUPPORT FOR, OR PERPETUATION OF, SUCH DISCRIMINATION 7

A. Under established precedent, Congress has compelling interests in preventing government support for, and addressing the effects of, racial discrimination. 8

B. The DBE program is an appropriate exercise of the power of Congress, including its power under the enforcement provisions of the Civil War Amendments. 11

C. Congress assembled strong evidence of a pattern of discrimination against minority contractors that supports the need for remedial action 17

D. Under *Croson*, the body of evidence necessary to justify congressional action is necessarily different from that required of state and local governments 21

TABLE OF CONTENTS -- CONTINUED

Page

II. THE DBE PROGRAM IS NARROWLY TAILORED TO SATISFY CONGRESS' COMPELLING INTERESTS 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ..... *passim*

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ..... *passim*

Adarand Constructors, Inc. v. Peña, 16 F.3d 1537 (10th Cir. 1994) 19

Adarand Constructors, Inc. v. Peña, 965 F. Supp. 1556 (D. Colo. 1997) 6, 9, 15

Board of Trustees of University of Alabama v. Garrett, 121 S. Ct. 955 (2001) 14, 22, 25

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 9

Bush v. Vera, 517 U.S. 952 (1996) 10

City of Boerne v. Flores, 521 U.S. 507 (1997) ..... *passim*

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994) 9

Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991) 9

Cortez III Service Corp. v. NASA, 950 F. Supp. 357 (D.D.C. 1996) 9

EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) 10

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) 17

Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 9, 10

In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026 (D. Minn. 1998) 9

TABLE OF AUTHORITIES -- CONTINUED

Page(s)

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 10
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 10, 14
Katzenbach v. Morgan, 384 U.S. 641 (1966) 13, 15
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) ..... *passim*
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 8, 12, 19, 22
Norwood v. Harrison, 413 U.S. 455 (1973) 9
Oregon v. Mitchell, 400 U.S. 112 (1970) 22
Reitman v. Mulkey, 387 U.S. 369 (1967) 9
Rothe Development Corp. v. United States Department of Defense, 49 F. Supp. 2d 937 (W.D. Tex. 1999) 9, 24
Shelley v. Kraemer, 334 U.S. 1 (1948) 9
United States v. Morrison, 529 U.S. 598 (2000) 14, 23, 24, 25
United States v. Virginia, 518 U.S. 515 (1996) 8
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 19
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 10, 17, 29

CONSTITUTIONAL AUTHORITY

U.S. Const. art. XIII 11-14
U.S. Const. art. XIV 11-15
U.S. Const. art. XV 11, 13

STATUTES AND REGULATIONS

15 U.S.C. § 637 ..... 2, 3
42 U.S.C. § 2000 10
49 C.F.R. § 26.15 27
49 C.F.R. § 26.21 4

TABLE OF AUTHORITIES -- CONTINUED

Page(s)

49 C.F.R. § 26.33(a) 29
49 C.F.R. § 26.43(a) 4
49 C.F.R. § 26.45 ..... 3, 4, 20, 25, 28
49 C.F.R. § 26.47 5
49 C.F.R. § 26.51 ..... 4, 26, 27
49 C.F.R. § 26.61(d) 29
49 C.F.R. § 26.65 27
49 C.F.R. § 26.67 ..... 3, 27, 28
49 C.F.R. § 26.87 3

STATUTORY AND LEGISLATIVE MATERIALS

144 Congressional Record S1402, 1403, 1404, 1423 (daily ed. Mar. 5, 1998) (statement of Sen. Baucus) 2, 5, 6, 30
144 Congressional Record S1401 (daily ed. Mar. 5, 1998) (statements of Sen. Warner) 5-6
144 Congressional Record S1433 (daily ed. Mar. 5, 1998) (statement of Sen. Boxer) 5-6
144 Congressional Record S1408, 1409 (daily ed. Mar. 5, 1998) (statement of Sen. Kerry) 5-6, 30
144 Congressional Record S1420 (daily ed. Mar. 5, 1998) (statement of Sen. Moseley-Braun) 30
144 Congressional Record S1423, 1425, 1427, 1428 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) 3, 4, 5, 6
144 Congressional Record S1429, 1430 (daily ed. Mar. 5, 1998) (statement of Sen. Kennedy) 5-6, 30
144 Congressional Record S1425 (daily ed. Apr. 1, 1998) (statement of Sen. Robb) 4
144 Congressional Record H2001 (daily ed. Apr. 1, 1998) (statement of Rep. Roukema) 20

TABLE OF AUTHORITIES -- CONTINUED

Page(s)

144 Congressional Record H2001 (daily ed. Apr. 1, 1998) (statement of Rep. Tauscher) 6
144 Congressional Record H2003 (daily ed. Apr. 1, 1998) (statement of Rep. Poshard) 6
144 Congressional Record H2004 (daily ed. Apr. 1, 1998) (statement of Rep. Bonior) 6
144 Congressional Record H2008-09 (daily ed. Apr. 1, 1998) (statement of Rep. Meek) 6
144 Congressional Record H2010 (daily ed. Apr. 1, 1998) (statement of Rep. Towns) 6
144 Congressional Record H2011 (daily ed. Apr. 1, 1998) (statement of Rep. Millender-McDonald) 6
144 Congressional Record S5403, S5414 (daily ed. May 22, 1998) (statement of Sen. Chaffee) 16
H.R. Rep. No. 105-467, part 1 (1998) 4, 5
Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 2
Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, 66 Fed. Reg. 23,208 (May 8, 2001) (to be codified at 49 C.F.R. pt. 26) 28
Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999) (to be codified at 49 C.F.R. pts. 23 & 26) ..... *passim*
Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042 (May 23, 1996) ..... *passim*
Small Business Act of 1953, Pub. L. No. 163, § 202, 67 Stat. 232 15
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 2

TABLE OF AUTHORITIES -- CONTINUED

Page(s)

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 2
Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 10
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 113 ..... *passim*
Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand, Hearings Before the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Committee on the Judiciary, 105th Cong., 17 (1997) 17

MISCELLANEOUS

U.S. Dep't of Transportation, *FHWA State DBE Goals FY 2001* (July 25, 2001) *at* http://osdbuweb.dot.gov/business/dbe/fhwagoal.html 4

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), American Civil Liberties Union (ACLU), Mexican American Legal Defense and Educational Fund (MALDEF), National Association for the Advancement of Colored People (NAACP), and People For the American Way Foundation (People For) respectfully submit this brief as *amici curiae* in support of Respondents' Disadvantaged Business Enterprise (DBE) program and its enabling statute, the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 113-115.[1]

The Lawyers' Committee, a nonpartisan and nonprofit organization, historically has been committed to issues of social justice and equal opportunity. The ACLU, a nonpartisan and nonprofit organization, is dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. It has long supported the constitutionality of affirmative action in appropriate circumstances. MALDEF, a national civil rights organization established in 1968, works to secure, through litigation, advocacy and education, the civil rights of Latinos living in the United States. The NAACP, established in 1909, is the nation's oldest civil rights organization and has state and local affiliates throughout the nation. Its fundamental mission is the advancement and improvement of the political, educational, social and economic status of minority groups and the elimination of racial prejudice. People For is a nonpartisan, education-oriented citizens'

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[1] Pursuant to Rule 37.6, the *amici* state that no counsel for any party in this case authored any portion of this brief, and no person other than the *amici* and their counsel have made any monetary contribution to its preparation or submission. Concurrent with this brief, letters of consent to its filing have been lodged with the Clerk of the Court under Rule 37.3.

organization established to promote and protect civil and constitutional rights.

STATEMENT OF FACTS

In response to persistent racial and gender discrimination in the construction industry, Congress enacted the DBE program to encourage the participation of minority- and women-owned businesses in federal contracting. *See, e.g.*, 144 Cong. Rec. S1402 (daily ed. Mar. 5, 1998) (statement of Sen. Baucus). The DBE program, currently authorized by Section 1101(b) of TEA-21,[2] directs that at least 10 percent of funds appropriated for federal transportation projects should be spent with "small business concerns owned and controlled by socially and economically disadvantaged individuals." Pub. L. No. 105-178, § 1101(b). An individual is "[s]ocially disadvantaged" under the statute if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to . . . individual qualities." 15 U.S.C. § 637(a)(5). An individual is considered "[e]conomically disadvantaged" if he or she is "socially disadvantaged" and his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit

[2] The DBE program was established in 1980 by regulation under the authority of certain federal nondiscrimination statutes. *See* Participation by Disadvantaged Business Enterprises in DOT Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999) (Final Rule). In 1983, Congress enacted -- and President Ronald Reagan signed -- the first statutory DBE program, which applied primarily to minority-owned businesses. *See* Surface Transportation Assistance Act (STAA), Pub. L. No. 97-424, 96 Stat. 2097. In 1987, through the Surface Transportation and Uniform Relocation Assistance Act (STURAA), Pub. L. No. 100-17, 101 Stat. 132, Congress expanded the program to include women-owned businesses. In 1991, Congress passed legislation, endorsed and signed by President George Bush, that reauthorized the DBE program. *See* Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914. On June 9, 1998, Congress enacted TEA-21.

opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). The statute affords certain minority and female contractors a presumption of disadvantage in the highway construction industry.[3] Pub. L. No. 105-178, § 1101(b). The presumption is rebuttable and subject to challenge by any person. 49 C.F.R. § 26.87.

The United States Department of Transportation (DOT), which administers the DBE program, has promulgated regulations to prevent the designation as DBEs of firms that are not in fact disadvantaged. Toward that end, all individuals claiming to be disadvantaged -- including "presumptively disadvantaged owner[s]" -- must certify that they are in fact socially and economically disadvantaged within the meaning of the statute and its regulations. *Id.* § 26.67(a)(1) (requiring submission of signed, notarized certification), and provide proof of personal net worth, *id.* § 26.67(a)(2). If the individual's personal net worth exceeds a regulatory limit of $750,000, or if the individual is not in fact socially and economically disadvantaged, the presumption of disadvantage is rebutted. *Id.* § 26.67(b).

Once certified, DBEs are eligible for participation in the DBE program. Under the program, state and local recipients of DOT financial assistance are required to determine the expected level of DBE participation in their area "absent the effects of discrimination," *Id.* § 26.45(b), and set their own goals for DBE participation based on local market conditions

[3] In addition to those presumed to be disadvantaged, *any* business owner -- regardless of race or gender -- may demonstrate social or economic disadvantage and, consequently, qualify for DBE status. 49 C.F.R. § 26.67. In fact, businesses owned by white males, including Petitioner Adarand Constructors, Inc., have qualified for the DBE designation. *See* 144 Cong. Rec. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) (quoting Letter to Sen. Domenici from Secretary Slater and Attorney General Reno).

and contractor availability.[4] A recipient then submits to DOT its proposal to achieve its overall participation goal. *Id.* § 26.21. This proposal often consists largely of race-neutral measures, but may also include race-conscious measures[5] as a last resort. *Id.* § 26.51(d). If a recipient determines that it can meet its goal without considering race, it must do so. *Id.* § 26.51(f)(1).

The DBE program, while designed to encourage the use of minority- and women-owned businesses, specifically prohibits recipients' use of quotas. *Id.* § 26.43(a); *see also* 144 Cong. Rec. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) (quoting Letter to Sen. Domenici from Secretary Slater and Attorney General Reno). Indeed, Senator Baucus, one of the floor managers of TEA-21 and ranking member of the committee of jurisdiction, confirmed that no quotas may be used[6] and that the contract goals are

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[4] These goals are not based on the 10 percent national goal articulated in the statute; indeed, the regulations counsel against reliance on the national goal. 49 C.F.R. § 26.45; *see also* 64 Fed. Reg. at 5109 (noting that recipients of DOT financial assistance must have regional participation goals); H.R. Rep. No. 105-467, Part 1, at 504 (stating that 10 percent goal "is a national target for DOT; state and local recipients of DOT funding set their own goals for DOT participation in construction projects based on the availability of disadvantaged businesses in their market").

[5] For example, in 2000, nine of the state recipients of federal highway assistance employed no race-conscious measures at all, and no state recipient of such assistance employed only race-conscious measures. *See* U.S. Dep't of Transportation, *FHWA State DBE Goals FY 2001* (July 25, 2001) *at* http://osdbuweb.dot.gov/business/dbe/fhwagoal.html.

[6] Similarly, Senator Robb observed during floor debate on the measure, "this program is not a 'quota program,' as some have suggested. There is a great difference between an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program uses aspirational goals." 144 Cong. Rec. S1425 (daily ed. Apr. 1, 1998).

not binding: "If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty." 144 Cong. Rec. S1403 (daily ed. Mar. 5, 1998).[7] Consequently, no contractor should ever lose a bid merely because it failed to satisfy minority participation goals. 64 Fed. Reg. at 5098.

In 1995, this Court addressed an earlier version of the DBE program in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Court did not reach the constitutionality of the program but held that strict scrutiny applies to all race-based classifications -- whether imposed by federal, state, or local government, *id.* at 227 -- and remanded the case for a determination whether the program satisfied that standard of review, *id.* at 237. The Court emphasized that strict scrutiny should not be "strict in theory, but fatal in fact." *Id.*

In response to the Court's decision in *Adarand*, Congress and DOT modified the DBE program. While the relevant statutory language has remained essentially the same, the federal government has significantly changed the way it implements the DBE program. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000). Indeed, Congress re-enacted the DBE program in TEA-21 with the express understanding that the relevant agencies would promulgate regulations designed to satisfy the Court's equal protection standards.[8] Those implementing regulations,

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[7] *See also* 49 C.F.R. § 26.47; H.R. Rep. No. 105-467, Part 1, at 504 ("There is never an absolute requirement that a particular goal be met."); 144 Cong. Rec. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) ("Nothing in the statute or regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals.") (quoting Letter to Sen. Domenici from Secretary Slater and Attorney General Reno).

[8] *See, e.g.*, 144 Cong. Rec. S1401, S1402, S1408, S1423, S1425, S1428, S1430, S1433 (daily ed. Mar. 5, 1998) (statements of Sens.

described above, were published on February 2, 1999. *See* 64 Fed. Reg. 5096.

Before DOT issued its revised regulations, the district court on remand found that the government had established a compelling interest to justify the DBE program but that the then-existing program was insufficiently tailored to satisfy strict scrutiny review. *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1581-83 (D. Colo. 1997). The United States Court of Appeals for the Tenth Circuit agreed that the federal government has compelling interests in "not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165; *see also id.* at 1176. The Tenth Circuit went on to consider the revised regulations for the DBE program, which had been promulgated after the district court decision. *Id.* at 1158-59. The court concluded that, while certain provisions of the old DBE program were not narrowly tailored, the revised regulations had cured the earlier deficiencies. *Id.* at 1187. The court therefore held that the current DBE program is narrowly tailored to further compelling interests. *Id.*

SUMMARY OF ARGUMENT

Congress has compelling interests in remedying racial discrimination and its effects, and in avoiding the use of federal funds to perpetuate such discrimination and its effects. Toward that end, Congress collected and considered extensive testimony, reports, statistical evidence, and social science data documenting persistent racial discrimination in public contracting and the construction industry. Having

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Warner, Baucus, Kerry, Domenici, Kennedy, and Boxer); 144 Cong. Rec. H2001, H2003, H2004, H2008-11 (daily ed. Apr. 1, 1998) (statements of Reps. Tauscher, Poshard, Bonoir, Meek, Towns, and Millender-McDonald).

assembled substantial record evidence of such discrimination, Congress established and reauthorized the DBE program and, in so doing, acted well within its constitutional authority under the Civil War Amendments.

Furthermore, DOT promulgated revised regulations to tailor the operation of the DBE program narrowly to the interests Congress sought to address. Closely considering this Court's decision in *Adarand*, DOT crafted the new program with the express intent of complying with the equal protection standards articulated therein. Indeed, the new DBE program far exceeds the Court's requirements: the program mandates use of race-neutral measures to satisfy minority participation goals; is designed to last no longer than is necessary to address the discrimination and lingering effects of such discrimination that Congress identified; incorporates an individualized inquiry into disadvantage for every firm designated as a DBE; and only minimally impacts third parties.

ARGUMENT

I. THE DBE PROGRAM FURTHERS THE COMPELLING INTERESTS IN REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION IN THE CONSTRUCTION INDUSTRY AND PREVENTING THE GOVERNMENT'S SUPPORT FOR, OR PERPETUATION OF, SUCH DISCRIMINATION.

This Court stated in *Adarand* that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." 515 U.S. at 237. Consistent with the authority it has to determine the scope of remedial legislation, Congress enacted the DBE program both to remedy the effects of persistent racial discrimination in the

construction industry and to prevent its perpetuation through the distribution of federal funds.[9]

A. Under established precedent, Congress has compelling interests in preventing government support for, and addressing the effects of, racial discrimination.

It is well-established that Congress has compelling interests in remedying the effects of private discrimination in the construction industry, and in preventing the perpetuation of these effects by the distribution of federal funds. *See id.* at 222, 237; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92, 503 (1989).[10] In *Croson*, for example, the Court applied strict scrutiny to a municipal contracting plan that required prime contractors to subcontract at least 30 percent of each contract to minority business enterprises. 488 U.S. at 493-94. While the Court decided that the city had not made a sufficient showing of discrimination, a majority of the Court made clear that, had such a showing been made, the government "would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." *Id.* at 503.[11] Similarly, Justice O'Connor stated that "[i]t is beyond

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9 We do not analyze separately the gender-specific aspects of TEA-21, because the questions before the Court do not implicate the less rigorous standard of intermediate scrutiny that is applicable to gender classifications. *See United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

10 *See also Croson*, 488 U.S. at 518 (Kennedy, J., concurring) (noting that "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610-11 (1990) (O'Connor, J., dissenting).

11 Justice O'Connor was joined by Chief Justice Rehnquist and Justice White. Additionally, the dissenting Justices agreed that a governmental entity has a compelling interest in "preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination." *Croson*, 488 U.S. at 537; *see also Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1519, 1529 (10th Cir. 1994); *Coral Constr. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 492.[12]

This Court has long held that it violates principles of equal protection for the government to support, encourage or give effect to discrimination practiced by private parties. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 572-74 (1974); *see also Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). In *Norwood v. Harrison* (on which the Court expressly relied in *Croson*), the Court concluded that the Constitution requires a governmental entity "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." 413 U.S. at 467; *see also id.* at 465 ("Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'") (citation omitted); Title VI of the Civil Rights

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12 Indeed, every court that has considered the constitutionality of race-conscious federal contracting programs since this Court's decision in *Adarand* has ruled that they are supported by a compelling governmental interest. *See, e.g., In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1034-35 (D. Minn. 1998); *Adarand*, 965 F. Supp. at 1570-77; *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 49 F. Supp. 2d 937, 951 (W.D. Tex. 1999); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996).

Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, 42 U.S.C. § 2000d *et seq.* (prohibiting discrimination in "any program or activity receiving Federal Financial Assistance").

Similarly, the government has a compelling interest in acting to prevent or avoid unconstitutional or unlawful conduct. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290-91 (1986) (O'Connor, J., concurring) (citing *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165-66 (1977), and *McDaniel v. Barresi*, 402 U.S. 39 (1971)); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996); *id.* at 990, 992, 994 (O'Connor, J., concurring); *id.* at 1033-35, 1014 n.9 (Stevens, J., dissenting). Vigilance is required to avoid the unconstitutional or unlawful use of government funds: "the Court has never attempted to formulate 'an infallible test for determining whether the State . . . has become significantly involved in private discriminations' so as to constitute state action. 'Only by sifting facts and weighing circumstances' (on a case-by-case basis) can the 'non-obvious involvement of the State in private conduct be attributed its true significance.'" *Gilmore*, 417 U.S. at 572-74 (quoting *Reitman*, 387 U.S. at 378, and *Burton*, 365 U.S. at 722). Congress also has authority under the Thirteenth Amendment to eliminate private racial discrimination and its effects in contracts and business relations.[13]

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13 *See, e.g., EEOC v. Mississippi College*, 626 F.2d 477, 488-89 (5th Cir. 1980). Congress is authorized by Section 2 of the Thirteenth Amendment to effectuate its guarantees in the same manner as Section 5 mandates securing the guarantees of the Fourteenth Amendment. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968); *see also Croson*, 488 U.S. at 490. Congress appropriately has acted to remedy and prevent private discrimination in contracts through the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981 and 1982. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). That same interest is served when Congress exercises its authority to define the conditions on which federal funds will be introduced into the construction industry. *See Fullilove v. Klutznick*, 448 U.S. 448, 510 (1980) (Powell, J., concurring).

In establishing the DBE program, Congress has acted to further the compelling interests that this Court has long recognized. Congress determined that the federal government, through its massive infusion of federal funds into the national highway construction industry,[14] had become a participant in a system of racial exclusion. *See* Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,062 (May 23, 1996). Thus, Congress justifiably took affirmative steps to avoid its further involvement in perpetuating a discriminatory system. As the Tenth Circuit stated, "[t]he Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice." *Adarand*, 228 F.3d at 1176. Nor does the Constitution require "Congress to acquiesce in the workings of an ostensibly free market that would direct the profits to be gleaned from disbursements of public funds to non-minorities alone." *Id.* at 1175. Were this not true, the federal government would be in the untenable position of endorsing racial discrimination in the construction industry by providing economic support ensuring its continuation.

B. The DBE program is an appropriate exercise of the power of Congress, including its power under the enforcement provisions of the Civil War Amendments.

Congress had ample authority to enact the DBE program under the Spending Clause, the Commerce Clause, Section 5

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14 Under TEA-21, for example, Congress authorized over $100 billion for use on federal highway projects. Pub. L. No. 105-178, § 1101(a).

of the Fourteenth Amendment, and Section 2 of the Thirteenth Amendment.[15] *See Fullilove*, 448 U.S. at 473-78. Each of these provisions confers broad powers on Congress. *Id.*

The Civil War Amendments, in particular, vest in Congress broad power to address matters of racial discrimination. In *Croson*, this Court reiterated the description of these "unique remedial powers" from Chief Justice Burger's opinion for the Court in *Fullilove*:

> 'Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.' Because of these unique powers, the Chief Justice concluded that 'Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct.

488 U.S. at 488 (internal citations omitted) (emphasis in original). The Court further recognized:

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15 The DBE program at issue regulates the manner in which States expend federal highway construction funds. Pub. L. No. 105-178, § 1101(b). Thus, the legislation reflects the authority of Congress under Section 5 of the Fourteenth Amendment, rather than the Fifth Amendment. *See Metro Broadcasting*, 497 U.S. at 605-06 (O'Connor, J., dissenting). Insofar as the DBE program seeks to remedy or prevent private discrimination without regard to state action, it is also an expression of the authority of Congress under Section 2 of the Thirteenth Amendment.

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach v. Morgan*, 384 U.S. at 651 ('Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment').[16]

Id. at 490 (emphasis in original). The Court has recently reaffirmed this unique power in *City of Boerne v. Flores*: "It is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." 521 U.S. 507, 539 (1997) (citation omitted).

Petitioner's suggestion that the federal government can never legitimately employ race-conscious measures (Pet. Br. at 18-23) is simply antithetical to the Fourteenth Amendment. *See Adarand*, 515 U.S. at 237 (noting the appropriateness of government responding to racial discrimination). This argument suggests that, in the case where acts of discrimination or their continuing effects could not be remedied by any race-neutral means, *there should be no remedy*. The Constitution does not require so unjust a result.

In exercising its unique remedial authority, Congress may legitimately implement programs to eliminate and

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16 The Court recognized that this same "enlargement[] of the power of Congress" was effected by the Thirteenth and Fifteenth Amendments, the other "Civil War Amendments." *Croson*, 488 U.S. at 490.

prevent the government's involvement in racial discrimination that has excluded racial minorities from economic opportunities. As the Court stated in *Kimel v. Florida Bd. of Regents*, "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and *to deter* violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." 528 U.S. 62, 81 (2000) (emphasis added).[17]

Of course, there are limits on Congress' ability to enact prophylactic legislation. For example, Congress must tailor its legislative action to "remedying or preventing" conduct that "transgress[es] the Fourteenth Amendment's substantive provisions." *Boerne*, 521 U.S. at 519; *see also Kimel*, 528 U.S. at 85-91. Because state discrimination and involvement in private discrimination are directly prohibited by the Fourteenth Amendment, and since Congress has the power to prohibit private discrimination under the Thirteenth Amendment -- which it appropriately has done with respect to the right to contract, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968) -- virtually all of the conduct regulated by the DBE program would likely be unconstitutional or unlawful.[18] The fact that the legislation also regulates some constitutional conduct does not render it

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[17] *See also id.* at 88 ("Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.").

[18] This fact distinguishes the DBE program from what the Court identified as the central defect of the laws in *Garrett*, *Morrison*, and *Kimel* -- namely, that most of the conduct prohibited by the laws at issue in those cases was not unconstitutional under the Fourteenth Amendment. *See Board of Trustees of University of Alabama v. Garrett*, 121 S. Ct. 955, 964 (2001); *Kimel*, 528 U.S. at 90-91; *U.S. v. Morrison*, 529 U.S. 598, 620-27 (2000).

beyond the scope of Congress' authority;[19] it is sufficient that the record establish only a "strong basis in evidence," "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Legislation like the DBE program is especially warranted where, as here, other measures have proven unsuccessful. By the time Congress enacted the initial version of the DBE program in 1978, "it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry." *Fullilove*, 448 U.S. at 511 (Powell, J., concurring); *see also id.* at 466 (describing congressional report that expressed "disappointment" with the "limited effectiveness" of earlier legislation). As both the district court and Tenth Circuit recognized, 965 F. Supp. at 1582-83; 228 F.3d at 1178, Congress had attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses, beginning with the Small Business Act of 1953, but determined that those remedies, without more, did not eradicate the effects of past discrimination.[20] Pub. L. No. 163, § 202, 67 Stat. 232; *see also* 61 Fed. Reg. at 26,053 & n.28.

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[19] Legislation enacted pursuant to Section 5 may sweep broader than merely prohibiting unconstitutional conduct. *See Kimel*, 528 U.S. at 81; *Boerne*, 521 U.S. at 518. For example, this Court has found certain legislation an appropriate exercise of Congress' Section 5 enforcement power, even though it contained discriminatory impact provisions not mandated by the Constitution. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966).

[20] While Petitioner now focuses on race-neutral alternatives (Pet. Br. at 45-47), Petitioner never challenged the district court's finding that Congress had unsuccessfully attempted to cure the effects of discrimination in the contracting market through race-neutral means. *Adarand*, 228 F.3d at 1178.

Congress' judgment regarding the inadequacy of alternative means has been re-evaluated and affirmed between the initial enactment and the most recent reauthorization of the DBE program.[21] As Senator Chafee, one of the floor managers of TEA-21 and the chairman of the committee of jurisdiction, stated during debate on the conference report, the DBE program "has proven both necessary to and effective in our efforts to remedy discrimination in transportation procurement markets. By reauthorizing the DBE program again this year, Congress has signaled its belief that . . . we need this program if we are to remove the continuing barriers confronted by minority- and women-owned businesses." 144 Cong. Rec. S5403-04, S5414 (daily ed. May 22, 1998). Through its system of reauthorization, Congress resolved that it should take affirmative steps to ensure compliance with existing legislation, as well as to avoid its complicity in a system of racial exclusion.[22] *See Adarand*, 228 F.3d at 1166-68 (noting that Congress' extensive debate regarding renewal of DBE program before passing TEA-21 confirmed that Congress had recently found a continuing remedial need for the DBE program). That judgment, which is within Congress' authority as a coordinate branch of government, should be respected.

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[21] The DBE program, which expires in 2004, remains subject to re-evaluation by Congress prior to any further extension or re-enactment. 64 Fed. Reg. 5103. Nevertheless, Congress need not "make specific factual findings with respect to each legislative action." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). Petitioner's suggestion in its petition for *certiorari* that the relevant legislative record is limited to the evidence that was before Congress at the time of the enactment of the initial program for disadvantaged businesses in 1978 (Pet. Cert. Br. at 16, 21, 22) reflects its misunderstanding of the legislative process.

[22] Notably, in both chambers of Congress, bipartisan majorities rejected amendments that would have effectively discontinued the DBE program. 64 Fed. Reg. 5096.

C. Congress assembled strong evidence of a pattern of discrimination against minority contractors that supports the need for remedial action.

For Congress' action to be justified by a proper remedial purpose, there must be a determination that the government had a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277. Congress need only adduce evidence of "widespread and unconstitutional . . . discrimination," *Kimel*, 528 U.S. at 91, and "evidence that [discrimination in contracting] had become a problem of national import," *id.* at 90 (quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999)). Here, Congress assembled significant and persuasive evidence that racial discrimination and its effects still exist in the national construction industry, and responded appropriately with corrective legislation. *See Adarand*, 515 U.S. at 237.

While the state of the legislative record is not dispositive, *see Florida Prepaid*, 527 U.S. at 646, the legislative history of the DBE program amply reveals "the evil of private prejudice" of which Justice O'Connor warned in *Croson*, 488 U.S. at 492. Over more than two decades, Congress has collected and considered extensive testimony, reports, statistical evidence, and social science data regarding the persistence of racial discrimination in public contracting.[23] The evidence established that, in addition to

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[23] *See, e.g.*, Appendix -- The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Study, 61 Fed. Reg. at 26,051 n.12, 26,054 n.32, 26,057 nn.84 & 86, 26,059 nn.101 & 108, 26,060 nn.115 & 117 (listing dozens of congressional hearings, from 1980 to 1996, regarding racial discrimination faced by minority-owned contracting businesses); *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand*, Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess., 25-80, 106-08 (1997) (testimony of Nancy McFadden, DOT General Counsel) (discussing evidence of racial

outright discrimination by prime contractors and suppliers, racial discrimination in other aspects of the industry, including access to financial credit and other "economic inequities," 61 Fed. Reg. at 26,052, 26,054-61, "hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets," *id.* at 26,050. In addition, state and local disparity studies "contain extensive statistical analyses . . . [that] revealed gross disparities between the availability of minority-owned businesses and the utilization of such businesses in state and local government procurement." *Id.* at 26,061. Based on the record, Congress determined that the disadvantages caused by racial discrimination continue to diminish federal contracting opportunities for minority-owned businesses. *Id.* at 26,062. Moreover, Congress recognized that federal procurement practices effectively subsidize the discrimination of private and public actors, *id.* at 26,062-63, which is unsurprising given the government's dominance in the highway construction industry.

The record Congress assembled leading to the adoption of the current DBE program constitutes the "strong basis in evidence" of compelling interests that satisfy strict scrutiny. Congress has assembled a much more substantial record demonstrating a need for the current DBE program than the record found adequate in *Fullilove*. The *Fullilove* program was adopted as a floor amendment to an appropriations measure, 448 U.S. at 458, "'*without any congressional hearings or investigation whatsoever*,'" *Croson*, 488 U.S. at 547 n.10 (emphasis added) (citation omitted). Despite the sparse legislative record and petitioner's insistence that Congress had not created a sufficient record to justify a race-conscious program, 448 U.S. at 520 n.4, the Court in *Fullilove* determined that "[a]lthough the Act recites no

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discrimination affecting government construction contracts); *id.* at 6-8 (testimony of Rep. Scott) (same).

preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.* at 478. The *Fullilove* program satisfied the equivalent of strict scrutiny review;[24] so too should the much more substantial record for the DBE program.[25]

Petitioner's arguments that the congressional record is inadequate to support corrective legislation are simply wrong. First, Petitioner complains that many of the discriminatory barriers that Congress seeks to remedy are race-neutral on their face. That fact may be true, but discrimination is seldom explicit, *see Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977), and there is little question that these barriers are *not* race-neutral in application.[26] For example, "[i]t has

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[24] Chief Justice Burger stated that the program was valid under either strict scrutiny or intermediate scrutiny. 448 U.S. at 491-92; *see also id.* at 495-96 (Powell, J., concurring) (noting that the plurality opinion had applied strict scrutiny); *Metro Broadcasting*, 497 U.S. at 608 (O'Connor, J., dissenting) (same). While the Court in *Adarand* questioned the standard of review invoked in *Fullilove*, 515 U.S. at 235, nothing in *Adarand* undermines the conclusion reached in Chief Justice Burger's primary opinion that Congress had "abundant evidence" from which it could conclude that minority businesses had been excluded from public contracting opportunities on account of racial discrimination, 448 U.S. at 477-78, nor the point here that the legislative evidence supporting the DBE program far exceeds the legislative record at issue in *Fullilove*.

[25] Petitioner, too, has acknowledged that the DBE program satisfies the requirements of a legislative record in *Fullilove*. *See Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1544 (10th Cir. 1994).

[26] Petitioner does not suggest that discrimination has not *in fact* hindered the participation of racial minorities as prime or sub-contractors in the construction industry. Even congressional opponents of the DBE program conceded this point. Representative Roukema, for example, who sponsored an unsuccessful amendment designed to defeat the program, stated that opponents of the DBE program were "not suggesting

been recognized in Congress that private sector business networks frequently are off-limits to minorities." 61 Fed. Reg. at 26,059 & nn.101, 108 (citing evidence of exclusion). Moreover, in *Fullilove*, this Court upheld a program justified partly by evidence of "difficulties confronting minority businesses," including "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses," 448 U.S. at 467, all of which were facially race-neutral.

Second, Petitioner incorrectly claims that Congress relied on statistics derived from an improper statistical pool because there was no evidence that minority contractors were available to do the work in question. (Pet. Br. at 29-30.) On the contrary, the studies on which Congress relied compared the "*availability* of minority-owned businesses and the *utilization* of such businesses in state and local government procurement." 61 Fed. Reg. at 26,061 (emphasis added). Moreover, when recipients develop their own DBE participation goals, the regulations require evidence of "the relative *availability* of DBEs in [the local] market." 49 C.F.R. § 26.45(b) (emphasis added). That requirement comports with this Court's rulings. In *Croson*, for example, this Court stated that an inference of discriminatory exclusion may arise "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or [its] prime contractors." 488 U.S. at 509. It is precisely that

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that there is no discrimination." 144 Cong. Rec. H2001; *see also id.* ("I know, of course, that discrimination exists . . . . There is no denying it.").

type of evidence on which Congress based the need to enact TEA-21.

D. Under *Croson*, the body of evidence necessary to justify congressional action is necessarily different from that required of state and local governments.

While this Court has ruled that strict scrutiny applies to any governmental race classification, *see Adarand*, 515 U.S. at 227, it emphasized that the range and scale of congressional acts are necessarily different from those of states and localities. Indeed, it has explicitly stated that Congress has a broader scope than its state and local counterparts with which to identify and address compelling national interests.[27] *See Croson*, 488 U.S. at 490.

Petitioner is wrong to suggest that, in order to satisfy strict scrutiny, the DBE program must meet the requirements to which the Court held the City of Richmond in *Croson*. That claim is repudiated by *Croson* itself. In distinguishing the Richmond City Council from the United States Congress, the Court in *Croson* emphasized that Congress "has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," a mandate which also includes the "power to define situations which *Congress* determines

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[27] For example, in *Fullilove*, this Court explicitly stated that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." 448 U.S. at 483 (Burger, C.J.). While *Adarand* overruled *Fullilove* insofar as it held that race-based programs by the federal government are subject to less than strict scrutiny, this Court has not questioned the distinctive authority of Congress. Rather, the Court rejected the claim made in Justice Stevens' dissent in *Adarand* that "we have ignored the difference between federal and state legislatures," noting that the Court was not addressing the scope of Congress' power to deal with the problem of racial discrimination or the extent to which courts should defer to such congressional authority. 515 U.S. at 230.

threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* (emphasis in original). Based on that mandate, the Court determined that "Congress may identify and redress the effects of society-wide discrimination," but that states and local governments did not have the same discretion. *Id.*

Congress is afforded considerable latitude in the manner in which it identifies and redresses racial discrimination through its power to enforce the Civil War Amendments. *See Adarand*, 228 F.3d at 1163; *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers . . . under § 5 of the Fourteenth Amendment'"); *Croson*, 488 U.S. at 504; *see also Garrett*, 121 S. Ct. at 964-65; *Kimel*, 528 U.S. at 89. Indeed, the *Croson* Court recognized this principle when it said that "[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." 488 U.S. at 489 (quoting *Fullilove*, 448 U.S. at 515-16 n.14). That is, the evidentiary showing necessary for Congress to demonstrate a compelling interest must be evaluated in the context of its legislative jurisdiction and unique enforcement powers. Because Congress' legislative authority differs from that of states and localities, so does the nature of the evidence required for it to demonstrate a compelling interest. *See id.* at 491.

Congress is not an amalgam of city councils, and is not required to develop an evidentiary predicate with the kind of local precision required of individual municipalities. *See Oregon v. Mitchell*, 400 U.S. 112, 133, 233 (1970) (upholding constitutionality of ban on literacy tests in national elections despite absence of state-by-state findings of discrimination); *see also id.* at 284 ("Congress was not required to make state-by-state findings" concerning the

discriminatory impact of literacy tests) (Stewart, J., with Burger, C.J., and Blackmun, J.). Although the scope of unlawful discrimination is undoubtedly relevant to the existence of a compelling interest to employ race-conscious remedies, *see U.S. v. Morrison*, 529 U.S. 598, 626-27 (2000), this Court has never held that Congress' capability to adduce such evidence is limited to locating unconstitutional discrimination in some particular number of states or localities. *See Boerne*, 521 U.S. at 533 (recognizing that although geographic limitations may ensure that Section 5 legislation is proportionate to the scope of the harm, "[t]his is not to say, of course, that § 5 legislation requires . . . geographic restrictions"). And it similarly has never held that Congress must adduce city-by-city, region-by-region, or state-by-state evidence of unconstitutional discrimination before it may legitimately impose national remedies. *See Adarand*, 228 F.3d at 1165 n.10.

Indeed, to require findings of discrimination in some pre-specified number of states would not only infringe on the deference afforded Congress to determine the content of remedial legislation, *see Boerne*, 521 U.S. at 536; *Kimel*, 528 U.S. at 81, it would also inappropriately constrain the evidentiary processes through which Congress enacts such legislation.[28] A requirement of state-by-state findings before Congress could enact remedial legislation would effectively eliminate its enhanced role as a national legislature brought about by the Civil War Amendments, and virtually guarantee that Congress could never pass such legislation. *See Rothe*,

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[28] On this latter point, this Court has deferred to Congress' competence to select the specific fact-finding avenues through which it detects unconstitutional discrimination. *See Boerne*, 521 U.S. at 531-32 ("As a general matter, it is for Congress to determine the method by which it will reach a decision."); *Fullilove*, 448 U.S. at 499-502 (Powell, J., concurring) (noting that Congress is especially qualified to make findings of fact).

49 F. Supp. 2d at 949. Such a result would contradict this Court's admonition in *Adarand* that strict judicial scrutiny not be "strict in theory, but fatal in fact." 515 U.S. at 237.

Petitioner mistakenly cites certain recent cases -- including *Boerne*, *Garrett*, and *Morrison* -- for the proposition that a compelling interest to remedy race discrimination is only justifiable in those states in which Congress has specifically found discrimination. (Pet. Br. at 33.) None of these cases provides support for Petitioner's position. *Boerne*, for example, does not provide that state-specific findings are required before national remedies may be imposed. Indeed, it specifically states that geographic restrictions are not required under Section 5. *See Boerne*, 521 U.S. at 533. The Court contrasted the evidence supporting laws motivated by religious bias with the evidence of racial discrimination supporting the provisions of the Voting Rights Act (VRA). *Id.* at 532-33. It concluded that, as the Court defined the right to religious freedom under the First Amendment, Congress adduced insufficient evidence of governmental infringement on that right to justify the Religious Freedom Restoration Act. *See id.*

Similarly, in *Garrett*, the Court ruled that Congress did not adduce sufficient findings that a nationwide pattern of *government* discrimination supported the Americans with Disabilities Act (ADA) as a valid exercise of Section 5. 121 S. Ct. at 965. Although the *Garrett* Court contrasted the evidence before Congress in enacting the VRA as instructive of the comparative insufficiency of the ADA findings, *id.* at 967, it did not hold that Congress must make state-specific findings before imposing national remedies. *Id.*

In *Morrison*, the Court contrasted the provision of the Violence Against Women Act (VAWA) at issue in that case with certain VRA provisions. 529 U.S. at 626-27. In finding a portion of VAWA unconstitutional, the Court noted in *dicta* that VAWA's remedies applied nationally, while the VRA's remedies applied only in those states where Congress

found discrimination. *See id.* In acknowledging these differences, however, the Court did not overrule its prior holding that Congress only need identify a "nationwide pattern of discrimination" before enacting remedial legislation, *see Kimel*, 528 U.S. at 89, a point demonstrated by the Court's subsequent decision in *Garrett*, 121 S. Ct. at 965.

The record before Congress is sufficient to establish such a nationwide pattern of discrimination in the construction industry. Although there is no requirement of geographic-specific findings of discrimination *to justify* remedial legislation, the DBE program employs the consideration of local market conditions in the operation of the program. Under the regulations, recipients set their own minority participation goals based on the availability of minority contractors in the local market. 49 C.F.R. § 26.45. To the extent that race-conscious measures are undertaken at all, they may be based on a variety of factors in the local market, including past utilization. *Id.* This requirement operates to tailor DBE participation goals to local needs and to limit the race-conscious measures of the program to those geographic regions where local market conditions indicate a need. For these reasons, Petitioner's reliance on *Boerne*, *Garrett*, and *Morrison* is misplaced.

II. THE DBE PROGRAM IS NARROWLY TAILORED TO SATISFY CONGRESS' COMPELLING INTERESTS.

In remanding this case, this Court in *Adarand* identified two specific questions for the lower court to address in the narrow tailoring inquiry: (i) whether Congress considered race-neutral means to achieve its interests, 515 U.S. at 237-38; and (ii) whether the DBE program was appropriately limited to "not last longer than the discriminatory effects it is

designed to eliminate,"[29] *id.* (quoting *Fullilove*, 448 U.S. at 513). With respect to these factors, the revised DBE program falls well within constitutional bounds. *See Adarand*, 228 F.3d at 1176-87. Moreover, other factors, such as the program's individualized inquiry into disadvantage and its limited burdens on third parties, demonstrate that the program is narrowly tailored.

Race-neutral Alternatives. The DBE program requires that participants employ race-conscious remedies only as a last resort. Specifically, applicable regulations mandate that participants "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a). These race-neutral alternatives may include outreach efforts, the provision of technical assistance to small businesses, and the formation of lending and bonding programs to assist small businesses in obtaining financing. *See* 49 C.F.R. § 26.51; *see also Adarand*, 228 F.3d at 1178-79. By law, therefore, a recipient must use race-neutral alternatives to achieve as much of its minority participation goal as possible *before* adopting any race-conscious measures. 49 C.F.R. § 26.51(d). If a recipient expects to be able to meet its entire overall goal through race-neutral means, it must implement its program without any use of race-conscious measures. *Id.* § 26.51(f)(1). The DBE program, therefore, satisfies this part of the strict scrutiny test. *See Croson*, 488 U.S. at 507.

Durational Requirements. The DBE program is also appropriately limited to ensure that race-conscious measures last no longer than necessary to address the discriminatory effects Congress identified. First, the DBE program, along

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[29] The Court identified these issues in connection with program-specific questions related to older versions of the relevant statutes and regulations, *Adarand*, 515 U.S. at 237-38, some of which are no longer in effect, *see Adarand*, 228 F.3d at 1159.

with TEA-21, expires in 2004, unless Congress reauthorizes the program pursuant to a determination that its remedies remain necessary. 64 Fed. Reg. at 5103. Second, the regulations require a recipient to reevaluate its DBE participation goal annually. Based on this annual review, the recipient proposes its minority participation goal for the following year and must reduce or eliminate the use of race-conscious means to the extent they become unnecessary. 49 C.F.R. § 26.51(f). Third, the duration of participation for any particular individual or firm is limited by the personal net worth threshold and business size requirements. When an individual's personal wealth exceeds $750,000, *see id.* § 26.67, or the DBE's gross receipts are inconsistent with those of a small business, *see id.* § 26.65, DBE program eligibility ends.

The durational limitations are bolstered by other aspects of the DBE program that ensure it is both flexible and limited in scope. The DBE program is strictly voluntary in that prime contractors are not denied opportunities to participate in federal procurement programs, and no contracts are withdrawn if a contractor fails to satisfy the participation goals. *See id.* § 26.51; 64 Fed. Reg. at 5098. Moreover, the statute explicitly provides that the Secretary of Transportation may waive the participation goal for any reason, Pub. L. No. 105-178, § 1101(b), and, under the DOT regulations, state and local recipients of DOT financial assistance may apply for waivers that will release them from almost any DOT regulation if they believe that they can achieve equal opportunity for DBEs through alternative approaches. 49 C.F.R. § 26.15. Correspondingly, recipients can be exempted from any provision of the regulations if special circumstances make compliance impractical. *See id.* § 26.15(a).

Individualized Inquiry. This Court has never held that a race-conscious remedy is constitutional only if it provides for an inquiry into the propriety of each beneficiary's receipt of

remedial aid. *See Adarand*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507-08. Nevertheless, the current DBE program provides for an individualized inquiry into each and every person who seeks the DBE designation to ensure that the program is proportional to the harm it seeks to remedy and prevent. *See Boerne*, 521 U.S. at 533. As Petitioner acknowledges (Pet. Br. at 10 n.6), the program provides that every participating business -- including "each presumptively disadvantaged" firm -- must be *certified* as a disadvantaged business enterprise. 49 C.F.R. § 26.67(a)(1). The certification process includes submission of a written, notarized certification of actual disadvantage and proof of personal worth, which is signed under penalty of perjury. *Id.* § 26.67(a). Contrary to Petitioner's suggestion (Pet. Br. at 11), the presumption of disadvantage does not alone render a business enterprise automatically eligible for the program. First, although several racial and ethnic groups are considered presumptively disadvantaged, if a particular group is not represented among a local market's available contractors, it will not be included in the analysis of available firms the recipient uses to set its participation goals. 49 C.F.R. § 26.45(b). Second, the government has crafted the implementing regulations to ensure that only disadvantaged persons participate. *See* Participation by Disadvantaged Business Enterprises in Dep't of Transporation Financial Assistance Programs, 66 Fed. Reg. 23,208, 23,210 (May 8, 2001) (to be codified at 49 C.F.R. pt. 26) (noting the importance of requiring proof of personal worth because "[r]ecipients must have a tool to ensure that non-disadvantaged persons do not participate in the program"). If the individual's worth exceeds the regulatory limit or if the individual is not in fact socially or economically disadvantaged, the presumption is rebutted. 49 C.F.R. § 26.67(b). By including a rebuttable presumption in the statutory scheme, Congress recognized the possibility that the opportunities of particular minority individuals may not now be affected by discrimination and its accompanying

disadvantages, and also that members of other groups may have suffered comparable social and economic disadvantage. *See Fullilove*, 448 U.S. at 489.

Minimal Impact on Third Parties. The DBE program exacts a relatively small cost on firms that do not receive a presumption of disadvantage. As long as a prime contractor makes good faith efforts to satisfy the participation goal, it will never lose a contract for failure to comply. 64 Fed. Reg. at 5098. In addition, to avoid any undue burden on non-DBE firms, the revised regulations require recipients to guard against an overconcentration of DBEs in a certain type of work; if a recipient determines that "DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work," it must devise strategies to address the overconcentration. 49 C.F.R. § 26.33 (describing strategies recipient might invoke to ensure "that non-DBEs are not unfairly prevented from competing for subcontracts"). Moreover, a firm *not* owned by a woman or member of a racial minority group can itself qualify as socially disadvantaged by a mere preponderance of the evidence.[30] *Id.* § 26.61(d). To the extent that any subcontractors are disadvantaged by their exclusion from the presumption of disadvantage, it is only incidental. Such a burden is permissible where the aim, as here, is to eradicate racial discrimination and its effects. *See, e.g., Wygant*, 476 U.S. at 280-81.

In contrast, the detriment to minority businesses in the absence of the DBE program would be substantial. By all accounts, the participation of minority businesses in government procurement programs would "fall dramatically

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[30] Under the old DOT regulations, non-minority applicants who sought DBE certification had to prove social disadvantage by clear and convincing evidence. *See Adarand*, 228 F.3d at 1191.

in the absence of at least some kind of remedial measures." 61 Fed. Reg. at 26,053; *see also id.* at 26,062 & nn.130-34 (citing studies); *Adarand*, 228 F.3d at 1174; 144 Cong. Rec. S1404 (daily ed. Mar. 5, 1998) (statement of Sen. Baucus) (citing experience of Michigan, where DBE participation in state highway program fell to zero in nine-month period after state terminated DBE program).[31] Considering the relative burden on affected parties and judged against the backdrop of this Court's equal protection jurisprudence, the DBE program is narrowly tailored to accommodate the government's legitimate remedial and preventive interests.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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31 *See also* 144 Cong. Rec. S1409-10 (statement of Sen. Kerry) (citing similar decreases in Louisiana, Florida, and California); *id.* at S1420-21 (statement of Sen. Moseley-Braun) (citing similar examples in Arizona, Arkansas, Rhode Island, and Delaware); *id.* at S1429-30, S1482 (statement of Sen. Kennedy) (citing similar examples in Nebraska, Missouri, Florida, and Pennsylvania).

Respectfully submitted,

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In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF FOR THE CITY AND COUNTY OF DENVER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE GOVERNMENT HAS A COMPELLING INTEREST IN REMEDYING THE EFFECTS OF PRIVATE DISCRIMINATION, WHICH HAMPER THE ABILITY OF MINORITY FIRMS TO COMPETE FOR FEDERAL CONTRACTS 5

II. THE GOVERNMENT ADDUCED A STRONG EVIDENTIARY BASIS FOR INFERRING THAT DISCRIMINATION AND ITS LINGERING EFFECTS DISTORT THE PUBLICLY-FUNDED HIGHWAY CONSTRUCTION MARKET 12

A. Petitioner Has Blatantly Misstated The Burden Of Proof: Although The Government Bears The Initial Burden Of Production, The Challenger Bears The Ultimate Burden Of Persuasion 13

TABLE OF CONTENTS — Continued

Page

B. This Court Should Rebuff Petitioner's Attempt To Shift The Burden Of Proof To The Government 14

1. The Government's Data Sufficed To Create An Initial Inference Of Discrimination 14

2. Persuasive Anecdotal Evidence Can Play A Significant Role In Informing And Reinforcing The Government's Statistical Showing 18

C. Petitioner Has Failed To Meet Its Burden Of Persuasion 20

1. Petitioner Failed To Rebut The Government's Statistical Showing . 20

2. Petitioner's Characterization Of The Obstacles Facing Minority Contracting Firms As Race-Neutral Finds No Support In The Evidentiary Record 21

TABLE OF CONTENTS — Continued

Page

III. AFFIRMATIVE ACTION REMAINS A CONSTITUTIONAL AND NECESSARY REMEDY FOR ENTRENCHED DISCRIMINATION AND ITS LINGERING EFFECTS 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases:

Adarand Constructors, Inc. v. *Pena*,
515 U.S. 200 (1995) 4, 8, 12, 26

Adarand Constructors, Inc. v. *Slater*,
228 F.3d 1147 (10th Cir. 2000) ..... *passim*

Associated Gen. Contractors of Calif., Inc. v.
Coalition for Econ. Equity, 950 F.2d 1401
(9th Cir. 1991) 8, 16

Associated Gen. Contractors of Ohio, Inc. v.
Drabik, 214 F.3d 730 (6th Cir. 2000) 15

Bazemore v. *Friday*,
478 U.S. 385 (1986) 21

Bob Jones Univ. v. *United States*,
461 U.S. 574 (1983) 6, 7

City of Richmond v. *J.A. Croson Co.*,
488 U.S. 469 (1989) ..... *passim*

Concrete Works of Colorado, Inc. v. *City and County*
of Denver, 36 F.3d 1513 (10th Cir. 1994) 8

Cone Corp. v. *Hillsborough County*,
908 F.2d 908 (11th Cir. 1990) 16

TABLE OF AUTHORITIES — Continued

Page

Contractors Ass'n of E. Penn., Inc. v. *City*
of Philadelphia, 6 F.3d 990 (3d Cir. 1993) ... 15, 19

Coral Constr. Co. v. *King County*,
941 F.2d 910 (9th Cir. 1991) 7, 8

Dothard v. *Rawlison*,
433 U.S. 321 (1977) 21

Freeman v. *Pitts*,
503 U.S. 467 (1992) 27

Fullilove v. *Klutznick*,
448 U.S. 448 (1980) 8, 11

In re Sherbrooke Sodding Co.,
17 F. Supp. 2d 1026 (D. Minn. 1998) 13

International Brotherhood of Teamsters v. *United*
States, 431 U.S. 324 (1977) 18

Johnson v. *Transportation. Agency, Santa Clara*
County, 480 U.S. 616 (1987) 13

Local 28, Sheet Metal Workers, Int'l Ass'n v. *EEOC*,
478 U.S. 421 (1986) 23, 25

McDaniel v. *Barresi*,
402 U.S. 39 (1971) 25

TABLE OF AUTHORITIES — Continued

Page

Mozee v. *American Commercial Marine Serv. Co.*,
940 F.2d 1036 (7th Cir. 1991) 19

North Carolina State Bd. of Educ. v. *Swann*,
402 U.S. 43 (1971) 25

Norwood v. *Harrison*,
413 U.S. 455 (1973) 7, 9

O'Donnell Constr. Co. v. *District of Columbia*,
963 F.2d 420 (D.C. Cir. 1992) 8

Ohio Contractors Ass'n v. *Keip*,
713 F.2d 167 (6th Cir. 1983) 15

Plessy v. *Ferguson*,
163 U.S. 537 (1896) 4, 24

Railway Mail Ass'n v. *Corsi*,
326 U.S. 88 (1945) 6

Roberts v. *United States Jaycees*,
468 U.S. 609 (1984) 6

Runyon v. *McCrary*,
427 U.S. 160 (1976) 6, 25

Sobel v. *Yeshiva Univ.*,
839 F.2d 18 (2d Cir. 1988) 17

TABLE OF AUTHORITIES — Continued

Page

United States v. *Georgia Power Co.*,
474 F.2d 906 (5th Cir. 1973) 28

United Steelworkers of America v. *Weber*,
443 U.S. 193 (1979) 25

Valentino v. *United States Postal Service*,
674 F.2d 56 (D.C. Cir. 1982) 17

Wygant v. *Jackson Bd. of Educ.*,
476 U.S. 267 (1986) 2, 13, 14

Statutes, Regulations, and Orders:

15 U.S.C. § 1691 25

42 U.S.C. § 1981 25

42 U.S.C. § 1983 25

42 U.S.C. §§ 2000c-2(a), (d) 25

The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26050 (1996) ..... *passim*

Executive Order No. 11246 (1965) 25

TABLE OF AUTHORITIES — Continued

Page

Miscellaneous:

Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 Colum. L. Rev. 1577 (1998) 7, 11

David A. Strauss, Affirmative Action and the Public Interest, 1995 SUP. CT. REV. 1 (1995) 27

Robert E. Suggs, Rethinking Minority Business Strategies, 26 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 101 (1990) 27

BRIEF FOR THE CITY AND COUNTY OF DENVER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The City and County of Denver ("Denver"), like many American cities, has received consistent and credible reports of racial discrimination in the construction contracting industry.[1] In response to these complaints, Denver commissioned a series of statistical studies and marshaled substantial anecdotal evidence, all of which demonstrated that discrimination and its lingering effects pervade the Denver construction market. Majority and minority contractors' associations, business people, and government actors alike testified to the entrenched nature of the discrimination, and the insidiousness of its effects on the ability of minority contractors to compete for construction projects. The evidence showed that absent affirmative action, minority-owned construction firms would be deprived of a genuine opportunity to compete for municipal projects in Denver, and their participation in these projects would plummet.

In response, Denver developed and implemented an exceedingly modest remedial program. The program requires merely that prime contractors working on City projects make good-faith efforts to solicit subcontracting bids from minority-owned businesses, and that they refrain from refusing to work with qualified minority subcontractors that are also the lowest-bidders for the project.[2]

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[1] This brief is filed by J. Wallace Wortham, Jr., City Attorney of the City and County of Denver pursuant to Rule 37.4 of the Rules of the Supreme Court.

[2] The constitutionality of Denver's program is currently on review in the Tenth Circuit, in *Concrete Works of Colorado, Inc.* v. *City*

Denver adopted this program because it has a strong interest in ensuring that it neither funds current discrimination, nor perpetuates the effects of past discrimination by rewarding the beneficiaries of discrimination with new contracting opportunities while passing over discrimination's victims. Denver writes to emphasize that state and local governments can only vindicate these critically important interests if it is feasible for them to adduce a "strong basis in evidence" (see *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 510 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality)) when entrenched discrimination or its effects actually distort their local contracting markets. Denver urges the Court to reject Petitioner's and its amici's invitation to transform the evidentiary requirement that a governmental body must muster a "strong basis" for inferring discrimination into an insurmountable obstacle to the adoption of much-needed remedies.

SUMMARY OF ARGUMENT

Under this Court's precedent, the government has the power — and indeed an affirmative duty — to refrain from "exacerbating a pattern of prior discrimination." *Croson*, 488 U.S. at 504 (plurality). The construction industry is marked by a pattern of prior discrimination that has left minority businesses unable to compete effectively for federal contracts because they are hamstrung by decades of virulent discrimination. These businesses have suffered (and continue to suffer) discrimination at the hands of clients and prime contractors; they pay higher prices for loans, bonding and supplies; and they are left out of the informal referral networks that are critical to contracting opportunities. In the absence of

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and County of Denver, Colorado, No. 00-1145, final disposition of which will await disposition of the case at bar.

affirmative action, the government would have no choice but to continue to pour public funds into this industry, thereby rewarding the firms that have benefitted from a racist system, freezing the status quo, and "tight[ening] the deadhand grip of prior discrimination * * * on the present and future." *Id.* at 538 (Marshall, J., dissenting).

The government's evidence of that pattern of discrimination is specific, powerful, and comprehensive. *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996) ("*The Compelling Interest*") incorporates by reference dozens of statistical studies and a mountain of anecdotal evidence, all of which demonstrates that "racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets." *Id.* at 26,050.

This case thus stands in marked contrast to *Croson*. In *Croson*, Richmond put forth no such evidence in support of its affirmative action program. Its only statistical proof compared the proportion of contracts awarded to minority firms to the minority proportion of the population at large, and thus relied on the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (citation and quotation marks omitted). Here, by contrast, the federal government offers many detailed statistical analyses, each of which documents substantial disparities between the proportion of contracts awarded to minorities in a particular geographic area and the proportion of minorities in the relevant sample pool: the set of contractors qualified and available to work on construction projects in that area. Richmond offered no anecdotal evidence; its only testimony consisted of statements by minority contractors who attributed

underutilization of minorities in the Richmond construction market to their unavailability. Here, by contrast, the government offers numerous anecdotal examples of discrimination against minority contractors. In Richmond, a legislature hastily enacted a rigid quota system with little basis in evidence. Here, the federal government has carefully developed and refined a highly flexible affirmative action plan reflecting precisely the values articulated by this Court. Yet, in the face of these obvious and dispositive differences, Petitioner seeks to equate this case with *Croson*.

Perhaps realizing that its failure to adduce any evidence in rebuttal is fatal to its challenge, Petitioner attempts to raise the bar — to render strict scrutiny "strict in theory, but fatal in fact." See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) (citation and quotation marks omitted). First, Petitioner argues that the government bears the burden of proving the constitutionality of an affirmative action program — a proposition rejected by this Court in *Wygant*. Second, Petitioner contends that the government can only present a strong basis in evidence with statistical studies that control for every imaginable variable, and that a party challenging an affirmative action program can meet its burden simply by hypothesizing a factor or two that might possibly have changed the outcome. Third, Petitioner claims that anecdotal evidence has no place in the government's showing. All of Petitioner's arguments are foreclosed by existing precedent.

Equating affirmative action with the racist "separate but equal" doctrine enunciated in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), Adarand insists that race-conscious remedies for discrimination be eliminated altogether. It contends that affirmative action is superfluous in the contracting industry because victims of discrimination have another remedy: "a lawsuit." Pet. Br. 22. Unfortunately, however, the myriad

causes of action for racial discrimination created by state and federal law have proven ineffective in eradicating either current discrimination or the lingering effects of past discrimination. Affirmative action thus remains a vital tool in the anti-discrimination arsenal possessed by federal, state and local governments.

ARGUMENT

I. THE GOVERNMENT HAS A COMPELLING INTEREST IN REMEDYING THE EFFECTS OF PRIVATE DISCRIMINATION, WHICH HAMPER THE ABILITY OF MINORITY FIRMS TO COMPETE FOR FEDERAL CONTRACTS.

The panel below concluded that the federal government had the power to employ a race-conscious remedy to dismantle discriminatory barriers to competition for government construction contracts, even if those barriers were erected by private actors. Pet. App. 25-26, 50-52. The panel reasoned in part that "[t]he Constitution does not obligate Congress to stand by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries * * * of the effects of racial prejudice." *Id.* at 52 (footnote omitted).

Apparently disagreeing with the latter proposition, Petitioner and its amicus, Center for Individual Rights, suggest that Congress lacked the power to redress some of the documented discriminatory barriers to entry and competition because it was unclear that the federal government had "passively participate[d]" in erecting those particular barriers. Pet. Br. 29 n.21; Amicus Br. 23-24 (disputing that federal "financial assistance" constituted sufficient participation to permit a federal remedy).

Petitioner's construction of the concept of passive participation and its exceedingly cramped view of the remedial powers of governments are at odds with this Court's clear holdings in *Croson*. In *Croson*, the plurality held, and a majority of the Justices agreed, that it is "clear" that a governmental body has authority to use race-conscious remedies "to eradicate the effects of *private* discrimination within its own legislative jurisdiction." *Croson*, 488 U.S. at 491-492 (plurality) (emphasis added); accord *id.* at 538 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).[3]

The plurality held that a government "passively participates" in private discrimination, and hence has an especially compelling interest in redressing it, when the government "possess[es] evidence that [its] *own spending practices are exacerbating a pattern* of prior discrimination." *Croson*, 488 U.S. at 504 (plurality) (emphasis added); *id.* at 538 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (agreeing with the plurality that "the interest in *ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is* * * * *compelling*) (emphasis added).

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[3] This holding was consistent with abundant precedent establishing that "the government has a fundamental, overriding interest in eradicating [private] racial discrimination." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). See also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624 (1984) (a State government's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is a "compelling * * * interest[] of the highest order"); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88 (1945).

A government's spending practices "exacerbat[e] a pattern of prior discrimination" (*Croson*, 488 U.S. at 504 (plurality)) both (i) when the government funds discrimination, and (ii) when it perpetuates a pattern of past discrimination by funding the beneficiaries of discrimination to the exclusion of the discrimination's victims. Petitioner does not appear to dispute the first proposition — that the federal government has the power to remedy discrimination by prime contractors and others that receive federal funding for public projects. Nor could it. The plurality in *Croson* declared that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 492 (citing *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973)).[4]

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[4] The power to remedy discrimination by the recipients of governmental funds, such as prime contractors, applies equally whether the recipients discriminate on public projects or instead limit their discriminatory conduct to private-sector projects. In both cases, whether directly or indirectly, the government is "financ[ing] the evil of private prejudice" (*Croson*, 488 U.S. at 492), by supplying the discriminator with the wherewithal to continue its conduct. "A State's constitutional obligation requires it to steer clear * * * of giving significant aid to institutions that practice racial or other invidious discrimination" — whether or not those institutions use the aid directly to implement their discrimination. *Norwood*, 413 U.S. at 467 (citation and quotation marks omitted). See also, *e.g.*, *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 916 (9th Cir. 1991) ("Mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy" the compelling interest requirement). Cf. *Bob Jones Univ.*, 461 U.S. at 604. See Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1601-1603 (1998).

Petitioner's amicus errs in disputing the second proposition, that the federal government has the power to alter its spending practices to avoid perpetuating the effects of past discrimination. Amicus Br. Center for Individual Rights 23-24. A government's "spending practices * * * exacerbat[e]" and perpetuate the effects of a pattern of prior discrimination when the government awards new contracting opportunities to majority firms that are better able to compete than minority firms because they have enjoyed the benefits of past race-based preferential treatment. By "bestow[ing] its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination," the government "tighte[ns] the deadhand grip of prior discrimination * * * on the present and future." *Croson*, 488 U.S. at 538 (Marshall, J., dissenting) (explaining the plurality's holding that the government has a compelling interest in avoiding spending decisions that "exacerbat[e] a pattern of prior discrimination"). Under such circumstances, the government has the power to act because, absent a remedy, federal funds will continue to be "*distributed in a manner which reinforce[s] prior patterns of discrimination.*" *Id.* at 504 (plurality) (emphasis added). See also *Concrete Works of Colorado, Inc.* v. *City and County of Denver*, 36 F.3d 1513, 1529 (10th Cir. 1994); *Associated Gen. Contractors, Inc.* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1413 n.10 (9th Cir. 1991); *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 916 n.6 (9th Cir. 1991); *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring).[5] In other contexts, this Court has

[5] Accord *Fullilove* v. *Klutznick*, 448 U.S. 448, 478 (1980) (plurality) (holding that Congress has the power to employ a remedy where "its traditional procurement practices, when applied to minority businesses, perpetuate the effects of prior discrimination"), *overruled in part on other grounds*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995).

held that the government has an affirmative *duty* to avoid perpetuating the effects of discrimination. See *Norwood*, 413 U.S. at 466 ("the Constitution does not permit the State to aid discrimination" through financial support to institutions that discriminate, "even where there is no precise causal relationship" between the financial support and the institution's "continued well-being").

In this case, the evidence showed that race-based barriers to entry and competition make it more difficult for minority-owned businesses to gain experience and to compete for public construction contracts. Pet. App. 31-49. Majority-owned contracting firms, as the beneficiaries of the discrimination, have access to comparatively cheaper capital, more favorable bond terms, and lower supply prices than minority businesses, better enabling them to submit a qualifying low bid for government work. Pet. App. 39-44; *The Compelling Interest*, 61 Fed. Reg. at 26,054-26,061. Majority contracting firms that have enjoyed unfettered entry into the construction industry may also have more experience than minority firms that have entered the market more recently as the result of discriminatory obstacles to business formation. Pet. App. 33-39; *The Compelling Interest*, 61 Fed. Reg. at 26,055-26,059. The panel correctly concluded that, absent a remedy, the federal government's "spending practices [would] exacerbat[e that] pattern" (*Croson*, 488 U.S. at 504) of discrimination and its lingering effects, by awarding new contracts to the market participants that are better able to compete because they have reaped the benefits of past or present discrimination. See Pet. App. 50-52; see also *id.* at 31 ("racial discrimination and its continuing effects have distorted the market for public [construction] contracts"); *id.* at 32-33

(finding "a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination").

Petitioner's amicus, the Center for Individual Rights, errs in deeming any effort by the government to ensure that its spending practices do not perpetuate the effects of past discrimination as a prohibited "attempt[] to remedy * * * societal discrimination." Amicus Br. 24. This Court has used the term "societal discrimination" to describe discrimination that is too "'amorphous'" and nonspecific, and too attenuated from the realm of the affirmative-action program, to permit a race-conscious remedy. *Croson*, 488 U.S. at 497 (citation omitted). Thus, for example, the doctrine concerning societal discrimination precludes a City from adopting affirmative action in construction contracting to redress "the sorry history of * * * discrimination in this country," absent evidence of specifically identified discrimination in the construction industry. *Id.* at 499. In the program at issue here, by contrast, the government employs a race-conscious remedy to redress *specifically identified* discrimination *in the construction industry itself*. Amicus's concern that the government's remedy is directed at "'amorphous'" discrimination that is far removed from the arena in which the discrimination is occurring is therefore misplaced.

To the extent that petitioner's amicus intends instead to suggest that the government lacks the power to redress discrimination by any actors in the construction industry other than direct federal fund recipients and prime contractors — such as banks, unions, suppliers, local contractors' associations, private-sector customers, and bonding companies — it also errs. This Court explicitly recognized in *Croson* that a government has "a compelling interest in preventing its tax dollars" from

exacerbating discrimination by "local contractors' associations," so long as the government documents the existence of such discrimination with sufficient particularity. See 488 U.S. at 503. The same reasoning applies to discrimination by other industry actors. The government put forth an enormous amount of direct and statistical evidence to support the inference that discrimination by a broad range of industry actors contributes substantially to the disadvantaged position of minority subcontractors in the construction industry. See Pet. App. 31-49. As just noted, discrimination by banks, bonding companies, and suppliers, for example, give nonminority contractors and subcontractors huge advantages in competing for federal contracts. By awarding contracts to majority companies that have a competitive advantage as a result of such discrimination, the federal government's spending practices "exacerbate" the effects of the discrimination by those industry actors. Under the doctrine this Court articulated in *Croson*, the government therefore has the power to remedy that conduct, so long as it is identified with the particularity required by the Fourteenth Amendment; and it is of no moment that the specific, identified discrimination occurs at the hands of one particular industry actor, like a bank, rather than another, such as a prime construction contractor. 488 U.S. at 504; *see also Fullilove*, 448 U.S. at 467 (plurality) (identifying discrimination that resulted in "deficiencies in working capital [and] inability to meet bonding requirements" as an appropriate basis for a federal remedy); Ayres, *supra*, 98 COLUM. L. REV. at 1610-1614 & n.129.

II. THE GOVERNMENT ADDUCED A STRONG EVIDENTIARY BASIS FOR INFERRING THAT DISCRIMINATION AND ITS LINGERING EFFECTS DISTORT THE PUBLICLY-FUNDED HIGHWAY CONSTRUCTION MARKET.

The government presented a wealth of specific and compelling evidence. Its statistical studies documented significant underutilization of minority construction businesses in comparison with their availability; discrimination by banks, bonding companies, and suppliers; and discriminatory impediments to business formation. The government buttressed these statistics with overwhelming anecdotal evidence that discrimination, both overt and subtle, and its lingering effects continue to pervade the construction industry. This evidence "more than satisfies the government's burden of production regarding the compelling interest for a race-conscious remedy." Pet. App. 54.

Unwilling to heed this Court's admonition that strict scrutiny must not be "strict in theory, but fatal in fact" (*Adarand*, 515 U.S. at 237 (citation and quotation marks omitted)), Adarand urges that the bar must be set higher — that the government must do more. Yet Petitioner has never, at any point in this case, presented any evidence to undermine the government's evidentiary showing that persistent discrimination in the federal contracting industry necessitates race-conscious remedial action. Petitioner now seeks to excuse that failure (and to make it easier to defeat affirmative action plans in the future) by shifting the burden of proof. Specifically, it (i) continues to attack the government's evidentiary showing on the basis of nothing more than sheer unsupported hypothesis; and (ii) criticizes the Court of Appeals' ruling that a party challenging the constitutionality of an affirmative action program must do more than sit on the sidelines and take

speculative potshots at the government's proof. This Court should rebuff Petitioner's attempts to undo decades of civil rights jurisprudence and to erect an insurmountable barrier to adoption of much-needed remedies.

A. Petitioner Has Blatantly Misstated The Burden Of Proof: Although The Government Bears The Initial Burden Of Production, The Challenger Bears The Ultimate Burden Of Persuasion.

Petitioner contends that "the government bears the burden of proving that [an affirmative action] program is constitutional." Pet. Br. 23 (quoting *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1033 (D. Minn. 1998)). It is not surprising that Petitioner's only source of support for this rather startling assertion is a lone district court opinion. What *is* surprising is Petitioner's decision to pursue this argument, given the clarity with which this Court has described the mechanics of the burden of proof in affirmative action cases.

Although the government bears the initial burden of producing a "strong basis in evidence for its conclusion that remedial action was necessary," the "ultimate burden remains with the [challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant*, 476 U.S. at 277-278 (plurality); see also *id.* at 292-293 (O'Connor, J., concurring); *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 626 (1987). Once the government comes forward with a prima facie case of discrimination, the challenger bears the burden of rebutting that case and ultimately demonstrating the unconstitutionality of the program. *Ibid.* This regime of shifting burdens of proof is entirely logical: the *challenger* is the plaintiff and thus, as in

any civil case, must bear the ultimate burden of proof. *Wygant*, 476 U.S. at 278 (plurality).

B. This Court Should Rebuff Petitioner's Attempt To Shift The Burden Of Proof To The Government.

1. The Government's Data Sufficed To Create An Initial Inference Of Discrimination.

The government invoked numerous statistical studies that identified significant disparities between the utilization and availability of minority and majority contractors. Petitioner attacks this evidence, contending that some of the studies failed to control with sufficient precision for the possibility that the minority contractors who were passed over lacked the particular level of bonding, capitalization, and "expertise," if any, to perform each of the particular "contracts in question," and for the possibility that the minority contractors were "otherwise engaged at the time" the specific contracts were available. Pet. Br. 29. Fundamentally, petitioner is contending that, to create even an initial inference of discrimination, statistical studies must control not only for general qualification, willingness, and availability, but must go further, by eliminating all conceivable "nondiscriminatory explanations for disparate treatment between comparable individuals." Pet. Br. 30 (citation and quotation marks omitted). Any lesser showing, petitioner contends, would amount to nothing more than "'the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population.'" Pet. Br. 30 (quoting *Croson*, 488 U.S. at 507).

Petitioner grossly misconstrues this Court's decision in *Croson*. In *Croson*, the Court held that a comparison between

the utilization of minority contracting businesses and the availability of *minorities in the general work force at large* rested upon the impermissible assumption that minorities would enter the construction industry in exact proportion to their representation in the general population. 488 U.S. at 507. The Court never suggested that a comparison between the utilization and availability of minorities who *had actually chosen to enter the construction industry, and were operating construction businesses*, was not probative of discrimination. To the contrary, such a comparison of availability and utilization of functioning contracting firms is precisely what *Croson* envisioned. See *id.* at 501, 510.

Explicating its holding, the Court invoked *Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167, 171 (6th Cir. 1983), abrogated, *Associated General Contractors of Ohio, Inc.* v. *Drabik*, 214 F.3d 730 (6th Cir. 2000), as an example of a case in which the city properly determined "how many [minority businesses] in the relevant market are qualified to undertake prime or subcontracting work in public construction products." *Croson*, 488 U.S. at 502. *Croson* noted that in *Keip*, the government calculated a utilization disparity by "relying on *[the] percentage of minority [contracting] businesses in the [relevant jurisdiction]*" — with no purportedly more precise measure of qualification and availability than presence in the market. *Ibid.* (emphasis added); accord *id.* at 510 (chastising Richmond for not having "ascertained how many minority enterprises are *present* in the local construction market") (emphasis added). See also, *e.g.*, *Contractors Ass'n of E. Penn., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1005 (3d Cir. 1993) (holding that a "disparity index," which "consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the 'population' of [local] construction firms,"

satisfies *Croson*); *Associated Gen. Contractors*, 950 F.2d at 1414 (same); *Cone Corp.* v. *Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (same).

Thus, contrary to Petitioner's contention, a documented disparity between the availability of minority businesses operating in the construction industry, and their utilization in that industry, does generate an initial inference of discrimination. As the Court below explained:

> We are certainly mindful that 'where special qualifications are necessary, the relevant statistical pool * * * must be the number of minorities qualified to undertake the particular task.' But here, we are unaware of such 'special qualifications' aside from the general qualifications necessary to operate a construction subcontracting business.

Pet. App. 45 (quoting *Croson*, 488 U.S. at 501-502) (emphasis in original).

The court below further observed that, although Petitioner speculated that minorities who had chosen to enter the construction industry might be less qualified, willing, and able to do construction work than majority individuals, Petitioner had failed to present *any* evidence to buttress that assumption. "[T]here is no evidence either in the record on appeal or in the legislative history before us that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications." *Id.* at 45-46 (emphasis in original). Absent such evidence, the assumption that minorities are any less qualified, willing or able than majority firms — for reasons other than the lingering effects of discrimination — is plainly impermissible.

Petitioner's insistence that the studies should have controlled for whether minority firms possessed sufficient bonding, capitalization, and experience is especially misplaced in light of the government's evidence that minority firms lack access to sufficient bonding, capitalization, and experience in some construction markets *precisely because of discrimination*. This evidence showed that these factors are not race-neutral explanations for the disparity, but rather race-tainted products of past discrimination. It is well established that a prima facie case of discrimination need never "control for" such race-tainted factors. See *Valentino* v. *United States Postal Serv.*, 674 F.2d 56, 71, 73 n.30 (D.C. Cir. 1982). Moreover, it is the *challenger* who bears the burden of proving that allegedly race-neutral factors are "not themselves tainted by * * * discrimination." *Sobel* v. *Yeshiva Univ.*, 839 F.2d 18, 35 (2d Cir. 1988). In this case, not only did Petitioner fail to meet its burden of demonstrating the race-neutrality of the factors for which it claimed the government should have controlled — but the government adduced substantial evidence establishing the opposite.

At bottom, Petitioner is seeking to shift the burden of proof to the government: it is asking this Court to require that the government *disprove* all conceivable nondiscriminatory explanations for the statistical disparity. We urge this Court to rebuff that attempt, as it is inconsistent with precedent and would make it very difficult for any governmental unit — federal, state or local — to put forth the required "strong basis in evidence" that would support an affirmative action program, even in the presence of the most urgent need for a remedy.

2. Persuasive Anecdotal Evidence Can Play A Significant Role In Informing And Reinforcing The Government's Statistical Showing.

In addition to its strong statistical showing, the government has invoked a mountain of anecdotal evidence to support its conclusion that discrimination continues to pervade the contracting industry. According to Petitioner, this anecdotal evidence has no place at all in the government's initial showing, and "may be considered only *after* a determination that the necessary statistical evidence of deliberate discrimination exists." Pet. Br. 29 (citation and quotation marks omitted) (emphasis added). This contention ignores the important role that anecdotal evidence can play in enabling a governmental body to explain a statistical disparity. The Court of Appeals correctly held that "[b]oth statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not." Pet. App. 29.

Anecdotal evidence has long been considered an important component of a prima facie case of a pattern or practice of discrimination. In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court recognized the power of this type of evidence in adducing a prima facie case: "[T]his was not a case in which the Government relied on statistics alone. The individuals who testified about their personal experiences * * * brought the cold numbers convincingly to life." *Id.* at 339 (quotation marks omitted). See also, *e.g.*, *Croson*, 488 U.S. at 480 (holding that Richmond had not made a sufficient showing in part because it had no anecdotal or "direct" evidence to explain the cause of the statistical disparity; to the contrary, all of the witnesses had testified that their failure to use minority contractors resulted from the fact that such contractors "were just not available");

Contractors Ass'n, 6 F.3d at 1003 ("combination of anecdotal and statistical evidence" was "potent"; indeed, "anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*") (citation and quotation marks omitted); *Mozee* v. *American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1039, 1043 (7th Cir. 1991) (same).

The government provided statements, *inter alia*, of minority contractors who arrived at job sites to find signs saying "No Niggers Allowed" and "Nigger get out of here," and who were told by prime contractors that, despite their low bids, they would not be hired because the prime contractors "had problems with minority subs in the past"; from minority business owners who testified that unions had rejected them on the basis of their race (see Pet. App. 35); and by minority business development experts and banking professionals, who testified about discrimination in lending. *The Compelling Interest*, 61 Fed. Reg. at 26,059 & n.100.[6] These statements

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[6] The government's anecdotal evidence also included, for example, "numerous detailed examples of the exclusionary operation of good old boy networks" (*The Compelling Interest*, 61 Fed. Reg. at 26,059 n.109) (citation and quotation marks omitted); the statements of "47 witnesses [who] reported specific incidents of racial discrimination * * * in attempting to secure performance bonds" (*The Compelling Interest*, 61 Fed. Reg. at 26,060 n.118 (citation and quotation marks omitted)); the statements of a "Hispanic business owner [who was] denied credit by [a] supplier who told him that 'we only sell on a cash basis to people of your kind'" (*id.* at 26,061 n.123 (citation omitted)); "frequent complaints pertaining to informal barriers [which] included being completely stopped by suppliers' discriminatory practices" (*ibid.*); and statements from "53 witnesses [who] reported specific incidents of racial discrimination * * * where materials or equipment suppliers would not extend the same payment terms and discounts to them as they knew were being made available

provide highly persuasive evidence that the demonstrated statistical disparities in subcontractor hiring are the result of past and present racial discrimination and not, as Petitioner conjectures, some race-neutral cause. In many cases, the testimony of union officials, bank employees, and members of the relevant industry is extremely probative and valuable because it enables the court to evaluate whether the government has raised an inference that the statistical disparities were actually caused by discrimination. Petitioner attacks the government for failing to demonstrate causation, but in many cases the inference of causation is best shown by reference to precisely the direct and anecdotal evidence that Petitioner would dismiss as lacking any real probative value.

C. Petitioner Has Failed To Meet Its Burden Of Persuasion.

1. Petitioner Failed To Rebut The Government's Statistical Showing.

Ultimately, Petitioner is objecting to the Court of Appeals' determination that the party challenging an affirmative action program must do more than just sit on the sidelines and criticize the government's statistical analysis: the challenger must produce concrete evidence that rebuts the government's showing.

The court below correctly held that "Adarand and the amici curiae supporting it have utterly failed to meet their 'ultimate burden' of introducing credible, particularized evidence to rebut the government's initial showing of the

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to white male owned contractors with the same financial histories" (*ibid.*) (citation, quotation marks and ellipses omitted). See generally *id.* at 26,059-26,061 & nn.100-125 (discussing anecdotal evidence in disparity studies incorporated in *The Compelling Interest*).

existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market." Pet. App. 50. As the Court of Appeals found, Petitioner merely issued "highly general criticism of the methodology of numerous 'disparity studies' cited by the government and its amici curiae as supplemental evidence of discrimination." *Id.* at 51. But the government is "not required to exhaust every possible source of evidence"; Adarand is "free to adduce countervailing evidence of [its] own." *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977). Adarand cannot prevail, because it has made "no attempt * * * — statistical or otherwise — to demonstrate that when the[] [omitted] factors were properly organized and accounted for there was no significant disparity." *Bazemore* v. *Friday*, 478 U.S. 385, 403 n.14 (1986).

2. Petitioner's Characterization Of The Obstacles Facing Minority Contracting Firms As Race-Neutral Finds No Support In The Evidentiary Record.

Petitioner attacks the Court of Appeals' determination that the following set of race-based barriers to entry and competition support an inference that discrimination hinders the ability of minority-owned firms to compete for government contracts: (1) the tendency of majority prime contractors to work only with other majority subcontractors; (2) majority prime contractors' use of bid shopping to undermine minority bids; (3) minority business owners' exclusion from unions; (4) the difficulty minority businesses have in obtaining sufficient credit; (5) minority businesses' comparative difficulty in obtaining bonding; and (6) minority businesses' comparative inability to obtain low prices from suppliers. Pet. Br. 27-28.

Petitioner speculates that each of these barriers might be explained by factors unrelated to discrimination. Petitioner hypothesizes, for example, that prime contractors might be rejecting minority subcontractors, not because of race, but instead because they simply prefer to work with white subcontractors with whom they have worked exclusively in the past, whom "they already trust." Pet. Br. 27-28. Petitioner conjectures that bid shopping might not be a pernicious means by which prime contractors intentionally evade the impartiality of blind bidding, but instead a harmless "practice by which prime contractors allow trusted former subcontractors to see and beat any lower bid from new, untested firms." *Ibid.* Unions might be excluding minority business owners not because of race, but because they have "no experience"; and banks and bonding companies might be denying credit and bonding, and giving comparatively unfavorable terms, to minority contractors more frequently than nonminority contractors because minority contractors lack "a credit history or collateral." *Ibid.* Petitioner also opines that perhaps minority businesses face higher prices from suppliers because they "have never purchased anything" from them before, rather than because the suppliers discriminate on the basis of race. *Ibid.*

There are at least two fatal problems with Petitioner's conveniently "race-neutral explanations" for the demonstrated disparate treatment suffered by minority businesses. First, these explanations are invented from whole cloth. Second, they are belied by the government's evidence, which is the only evidence in this case. As the Court of Appeals found, the government demonstrated that *racial discrimination* created these obstacles. "The government's evidence strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms." Pet. App. 41. The

government showed that white prime contractors prefer to work with white subcontractors not out of familiarity, but out of racism. *Id.* at 41-42. Bid shopping is not harmless favoritism toward trusted colleagues, but a form of "exclusion" that perpetuates the effects of past discrimination. *Id.* at 40-41. Minority business owners are not excluded from unions as a result of their inexperience; rather, the government produced "studies of statistical and anecdotal evidence finding racism by construction trade unions." *Id.* at 35; see also *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986). Minority firms have insufficient capital not because they lack collateral but because of "race-based denial of access to capital," of which "[t]he government's evidence is particularly striking." Pet. App. 35. Minority firms' lack of access to bonding is not merely an unfortunate byproduct of inexperience but rather of "overt racial discrimination in the bonding market." *Id.* at 41-42. Suppliers favor white subcontractors not because of long-standing relationships, but out of racism: "the government present[ed] evidence of discrimination by suppliers, the result of which is that nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors, driving up anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 43-44 (citation and quotation marks omitted).

Petitioner has never put forth a shred of proof to rebut the government's evidence — to buttress its speculation that these obstacles might have been erected by forces other than discrimination. See Pet. App. 50-54. Just as with the government's statistical evidence, Petitioner is confusing the burden of proof: once the government came forth with evidence that these obstacles were rooted in racial bias, the burden shifted to Petitioner to prove — not just hypothesize —

some other cause. Petitioner "utterly failed" to do so. 228 F.3d at 1175.

It is true that in *Croson*, this Court held that the City of Richmond could not rely on "a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, [and] unfamiliarity with bidding procedures." 488 U.S. at 498-499. But the government's reliance on these same factors is entirely different, and entirely appropriate, where the government has put forth hard evidence to demonstrate that these factors are not at all "nonracial" in nature — that they are the result of discrimination aimed particularly at minority-owned firms. This Court should reject Petitioner's argument that these factors can never contribute to an evidentiary showing of discrimination.

III. AFFIRMATIVE ACTION REMAINS A CONSTITUTIONAL AND NECESSARY REMEDY FOR ENTRENCHED DISCRIMINATION AND ITS LINGERING EFFECTS.

Dubbing its position the "Harlan Doctrine," Adarand equates affirmative action with the racist "separate but equal" doctrine that Justice Harlan condemned in his dissent in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and demands that this Court abolish affirmative action entirely, or "at least as to government contracting." Pet. Br. 21. According to Adarand, affirmative action is unnecessary as a remedy for discrimination in contracting, because victims of discrimination "always" have another remedy at their disposal: "a lawsuit." Pet. Br. 22.

Adarand errs. This Court repeatedly has held that race-conscious remedies are entirely consistent with, and indeed are sometimes necessary to achieve, the constitutional mandate of

racial equality.[7] That is especially true where, as in the case of discrimination in construction contracting, the alternate remedy of "a lawsuit" — which has long been available — has proved monumentally ineffective in eradicating the identified discrimination and its effects. An array of federal and state laws have prohibited discrimination in contracting, lending, and union membership for decades.[8] Yet, as the federal government

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[7] This Court has endorsed affirmative action as a critical tool for "abolish[ing] traditional patterns of racial segregation and hierarchy" and "open[ing] * * * opportunities for [minorities] in occupations which have been traditionally closed to them." *United Steelworkers of Amer.* v. *Weber*, 443 U.S. 193, 203-204 (1979). It is effective both to "dismantle prior patterns of * * * discrimination and to prevent discrimination in the future." *Sheet Metal Workers*, 478 U.S. at 474. Thus, *race-conscious action* can be both necessary and effective to help achieve *racial equality*. See, *e.g.*, *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971) (striking down ban on race-conscious treatment of students because it precluded an "effective remedy"). *Cf. Sheet Metal Workers*, 478 U.S. at 475 (refusing to interpret Title VII's prohibition against discrimination as a prohibition of race-conscious affirmative remedies, because to do so "would deprive the courts of an important means of enforcing [the] guarantee of equal employment opportunity").

[8] Section 1981 prohibits private parties from intentionally discriminating on the basis of race in the formation of contracts. 42 U.S.C. § 1981; *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Executive Order No. 11246 (1965) has long prohibited discrimination by federal contractors, and provides debarment as a remedy for a violation. Federal and state laws prohibit discrimination by lenders. See, *e.g.*, 15 U.S.C. § 1691. Title VII of the Civil Rights Act of 1964 forbids discrimination by labor unions. See 42 U.S.C. §§ 2000e-2(a), (d). Section 1983 allows individuals to sue officials for civil rights abuses committed under color of state law. 42 U.S.C. § 1983.

documented, current discrimination and the effects of decades of past discrimination continue to deny minority-owned businesses an equal opportunity to compete for federal contracts. See *The Compelling Interest*, 61 Fed. Reg. at 26,050.

The reasons that lawsuits have proven an ineffective remedy are manifold. First, and most importantly, the "remedy" of a lawsuit does nothing to address the "lingering effects" of past discrimination, which the government indisputably has the power to remedy. See *Adarand*, 515 U.S. at 237; *Croson*, 488 U.S. at 491. Such effects of past discrimination are among the most formidable obstacles to equal opportunity that confront minority construction firms. See *The Compelling Interest*, 61 Fed. Reg. at 26,054-26,061. Yet these lingering discriminatory effects often are the product of too many different kinds of discrimination by too many different actors to present a viable basis for legal action. Even if a cause of action were otherwise available, it would likely be time-barred. Thus, for example, discriminatory exclusion of minority firms from informal community business networks, which afford their members business alliances, contacts, and contracting opportunities, generally are not remediable by means of litigation.[9] Similarly,

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[9] Congress specifically found that other remedies, particularly anti-discrimination laws giving rise to a private right of action, have been ineffective in eradicating the effects of racism. See *The Compelling Interest*, 61 Fed. Reg. at 26,053 ("Congress has concluded that, standing alone, legislation that simply proscribes racial discrimination is an inadequate remedy. Congress also has attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses. Congress has determined, however, that those remedies, by themselves, are ineffectual in eradicating the effects of past discrimination, and that race-conscious measures are a necessary supplement to race neutral ones.") (citation and quotation marks omitted).

the government presented evidence that the more recent market entry of many minority firms is the result of generations of discrimination. See *The Compelling Interest*, 61 Fed. Reg. at 26,054; Point II.C.2 supra. To the extent, if any, that these disadvantages might preclude full future participation, they too would be irremediable absent affirmative action.

Second, discrimination often is very difficult to prove. See *The Compelling Interest*, 61 Fed. Reg. at 26,062 ("[D]iscrimination has been, in many instances, deliberate and overt. But it also can take a more subtle form that is inadvertent and unconscious."). See also, *e.g.*, *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992) ("[I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* discrimination have been eliminated."). Indeed, a minority subcontractor often has no means of learning even whether it submitted the lowest bid, let alone whether the reason it was rejected was racial animus. See generally David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1. Requiring that records of subcontractor bidding processes be made public would not ameliorate this problem, as Adarand suggests (at Pet. Br. 22), because contractors often do not employ *any* formal bidding processes, and the "processes" they employ are too informal and subjective to reveal discrimination. See Robert E. Suggs, *Rethinking Minority Business Strategies*, 26 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 101, 115-116 (1990).

Third, minority-owned businesses often do not have the opportunity to bid for contracts in the first instance: "closed networks" of prime- and subcontractors are often unwilling to admit minority entrants. See *The Compelling Interest*, 61 Fed. Reg. at 26,058 ("[M]inority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain

affirmative action requirements.") (citing numerous studies). Even in the absence of blatantly race-based refusals to allow minority-owned firms to bid, these business networks "isolate [minority-owned firms] from the web of information which flows around opportunities, thereby putting them at a distinct disadvantage relative to nonminority firms." *Id.* at 26,060 (internal quotation marks and citations omitted).[10] Finally, even when minority-owned firms suspect discrimination and can adduce sufficient evidence of it, they are often unwilling to sue for fear that they will be blacklisted in their close-knit local industries when they bid for future projects.

For all of these reasons, the availability of antidiscrimination measures alone has proven inadequate to remedy the persistent discrimination, and its lingering effects, that distort the construction market. In such circumstances an affirmative remedy is both appropriate and necessary. See *Croson*, 488 U.S. at 509; sources cited *supra* note 7.

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[10] As a practical matter, the government cannot monitor the informal transfer of information about upcoming projects sufficiently to remedy this disadvantage in the absence of affirmative action. See *The Compelling Interest*, 61 Fed. Reg. at 26,059-26,060 & nn.110-112 (explaining that "[r]estricted access to business networks can particularly disadvantage minorities in the planning stages of government procurement" and discussing study "citing numerous allegations that black contractors learned of bid opportunities much later than their white competitors that are tied into the 'good old boy' network") (citations, quotation marks and ellipses omitted). See also *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973) ("failure to order [word of mouth recruitment practices] to be supplemented by affirmative action * * * was clearly an abuse of discretion") (cited in *The Compelling Interest*, 61 Fed. Reg. at 26,060 n.110).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THIS COURT SHOULD FULFILL ITS *ADARAND I* PROMISE THAT STRICT SCRUTINY IS NOT FATAL IN FACT BY AFFIRMING THAT THE CHALLENGED DBE PROGRAM MEETS ATTAINABLE CONSTITUTIONAL STANDARDS	4
A. The DBE Program Is Supported By The Compelling Interest Of Remedying Identified Public and Private Discrimination	6
1. Governments Have A Compelling Interest In Remedying Identified Private Discrimination, As Well As Identified Public Discrimination, Through Affirmative Action Programs	7
2. The DBE Program Is Supported By And Designed To Require Strong Evidence Of Identified Discrimination In Relevant Contracting Markets	15
B. The DBE Program is Narrowly Tailored To Remedy Identified Discrimination	19
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1598 (2001)	6, 19
Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)	*passim*
Associated General Contractors Inc. v. Coalition for Econ. Equity, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)	8
Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987)	12
Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)	17
Bob Jones Univ. v. United States, 461 U.S. 574 (1983)	12
City of Boerne v. Flores, 521 U.S. 507 (1997)	18
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	*passim*
Contractors Ass'n of Eastern Pa. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997)	8
Florida Prepaid Postsecondary Ed. Exp. Bd. v. College Savings Bank, 527 U.S. 627 (1999)	17-18
Fullilove v. Klutznick, 448 U.S. 448 (1980)	2, 5, 24
Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996)	8
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	13
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	17
National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)	13
O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)	8

TABLE OF AUTHORITIES—Continued

	Page
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	22
Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)	12
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	13
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	13
Runyon v. McCrary, 427 U.S. 160 (1976)	12
Rust v. Sullivan, 500 U.S. 173 (1991)	13
Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991)	8
United States v. Morrison, 529 U.S. 598 (2000)	17
United States v. Paradise, 480 U.S. 149 (1987)	13
United Steelworkers v. Weber, 443 U.S. 193 (1979)	23
White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983)	12-13
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	*passim*

Statutes & Regulations

49 C.F.R. § 26.45	15, 18
49 C.F.R. § 26.45(b)	15-16, 24
49 C.F.R. § 26.45(f)	24
49 C.F.R. § 26.51	22
49 C.F.R. § 26.51(b)	22
49 C.F.R. § 26.51(b)(2)	22
49 C.F.R. § 26.51(b)(5)	22
49 C.F.R. § 26.51(b)(6)	22
49 C.F.R. § 26.51(b)(7)	22
49 C.F.R. § 26.51(f)	23
49 C.F.R. § 26.67(a)	15
49 C.F.R. § 26.67(b)	15

TABLE OF AUTHORITIES—Continued

	Page
49 C.F.R. § 26.67(d)	15
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)	22
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §1101(b)(6), 112 Stat. 107, 114-115 (1998)	24
42 U.S.C. § 1981	22
Other Authorities	
U.S. General Accounting Office, Report to Congressional Committees, *Disadvantaged Business Enterprises: Critical Information Is Needed To Understand Program Impact* (June 2001)	23
U.S. Small Business Administration, *Washington D.C. Small Business Resource Guide* (2001 edition)	22

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments.[1] *Amici* have a particular interest in preserving the ability of States and local governments to remedy identified racial discrimination in their jurisdictions through a wide variety of constitutional means.

Amici's members are directly involved both in designing and administering affirmative action programs at the state and local level, and in administering federally-funded affirmative action programs such as the program challenged in this case. The elaboration of realistically attainable constitutional standards for affirmative action programs is crucial to those missions.

In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (*"Adarand I"*), this Court assured governments that carefully crafted and substantiated affirmative action programs could meet constitutional requirements. The design of and support for the challenged DBE program represents the best efforts of Congress and the Department of Transportation to address constitutional concerns. The resulting program does not violate petitioner's equal protection rights, but rather, in remedying the injuries of victims of discrimination, vindicates the equal protection rights of all.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authorized in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Adarand I*, this Court assured governments that strict scrutiny of affirmative action programs is not necessarily "'fatal in fact.'" *Adarand I*, 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). The challenged DBE program survives this endurable strict scrutiny, because it is squarely directed at the compelling governmental interest of remedying identified private and public discrimination and their effects in the federal contracting market, and is narrowly tailored to avoid burdening nonminorities with any unnecessary use of race-conscious measures.

A. The DBE program furthers the compelling state interest of remedying identified public and private discrimination. Although petitioners challenge the federal government's use of affirmative action to remedy purely private discrimination, this Court should take this opportunity to reaffirm in unmistakable terms that evidence of identified purely private discrimination can support affirmative action. Both the directly applicable precedents of this Court and the spending power and equal protection principles it has enunciated lead to the conclusion that the Constitution does not ban the use of affirmative action programs to redress injuries caused by identified private discrimination.

The evidence of unremedied discrimination in contracting markets amassed by the federal government is more than sufficient to establish a compelling need for affirmative action. Importantly, under the current design of the DBE program, program recipients must continue to gather evidence of local market discrimination, and to set DBE participation goals based on that evidence. Thus, the strength of the federal govern-ment's ample pre-enactment evidence is bolstered by local, ongoing factfinding efforts, and the scope of the remedy is adjusted in accordance with those findings.

Petitioner has no basis in law or logic for its argument that Congress had to find evidence of discrimination in a majority of States before enacting a nationwide affirmative action program. The cases petitioner cites in support of this novel requirement all concern the abrogation of state sovereign immunity, the preemption of state law, or the direct regulation of traditionally state-regulated private behavior. Although *amici* and its members would have a particular cause for concern if the DBE program implicated any of those interests, the program is in fact a federal spending measure that in no way intrudes on state prerogatives. Congress had sufficent pre-enactment evidence of widespread discrimination, and that evidence is supplemented by the ongoing factfinding man-dated by the DBE program.

B. The DBE program is a narrowly tailored response to the unremedied discriminatory injuries that Congress found in public contracting markets. All affirmative action programs are based on the recognition that, given the long history of racial discrimination in this country, there are grave injuries caused by discrimination that would remain unremedied if governments had to rely exclusively on race-neutral antidiscrimination laws. Thus, although affirmative action programs may end up calling upon "innocent persons . . . to bear some of the burden of the remedy," *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281 (1986) (plurality opinion), exclusive reliance on race-neutral measures will leave other innocent persons—the individual victims of discrimination—to bear the full, concentrated weight of their injuries. Constitutional standards for narrow tailoring must take into account the realization that affirmative action programs will never do perfect justice, but that controlled, imperfect justice is better than none at all.

The DBE program meets all realistically attainable standards of narrow tailoring. Congress spent twenty-five years trying a variety of race-neutral means for remedying

discrimination in contracting markets before concluding that an affirmative action program was required. The current version of the program requires ongoing efforts by each program recipient to use race-neutral means to meet minority participation goals, and the federal government remains actively involved in improving the variety and effectiveness of other race-neutral measures for promoting equality in contracting markets.

The DBE program also meets the narrow tailoring requirements of avoiding undue burdens on innocent nonminorities and ensuring that race-conscious measures are used only so long as needed. The program does not disrupt any settled expectations, but merely distributes a limited number of future opportunities to contract, leaving other such opportunities untouched. It does not use rigid quotas, but is instead based on capped subsidies and aspirational goals that are set by program recipients to reflect the underutilization of "ready, willing, and able" minority contractors in local markets. If minority participation goals are achievable by race-neutral means, the program requires the discontinuation of race-based subsidies. Thus, the DBE program complies with all realistically attainable standards for narrow tailoring, and should be upheld as a valid effort to further the compelling governmental interest in remedying identified racial discrimination.

ARGUMENT

THIS COURT SHOULD FULFILL ITS *ADARAND I* PROMISE THAT STRICT SCRUTINY IS NOT FATAL IN FACT BY AFFIRMING THAT THE CHALLENGED DBE PROGRAM MEETS ATTAINABLE CONSTITUTIONAL STANDARDS

In 1995, this Court held that the Constitution requires strict scrutiny of all programs employing racial classifications, whether sponsored by federal, state, or local governments, and whether favoring minorities or nonminorities. *See Adarand*

Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("*Adarand I*"). A majority of the Court, however, assured governments that strict scrutiny is not "'fatal in fact'" for narrowly tailored race-conscious programs that address "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)); *see id.* at 243 n. 1 (Stevens, J., dissenting); *id.* at 268 (Souter, J., dissenting); *id.* at 275 (Ginsburg, J., dissenting).

In reliance on that assurance, governments on all levels have striven to follow this Court's guidance in designing constitutional affirmative action programs to remedy grave and otherwise unremediable injuries caused by racial discrimination. In its current version, the challenged DBE program, like many other programs nationwide, contains comprehensive efforts to meet and exceed the standards of strict scrutiny articulated in *Adarand I* and in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). This case provides the Court the opportunity to fulfill its *Adarand I* promise by upholding a carefully substantiated and crafted affirmative action program while continuing to elaborate achievable constitutional standards to guide federal, state, and local governments.

As detailed below, the DBE program seeks to eradicate past and present identified discrimination by both public and private entities, objectives that are compelling interests under a proper reading of this Court's precedents. The program is based on and designed to require strong evidence of such discrimination. Both the program's general design and a number of its specific components ensure that it will not unduly burden innocent minorities, unnecessarily use race-conscious means, or last longer than do the injuries it was designed to remedy.

If the DBE program is nonetheless adjudged to fall short of the constitutional threshold, it will be hard to avoid the conclusion that the threshold is out of the reach of any government, and that strict scrutiny is in fact invariably fatal to real-world affirmative action programs. If that is the case, *amici* and their members have a strong interest in a plain statement to that effect, so that they do not continue to toil at devising constitutional affirmative action programs. Under *amici*'s reading of this Court's precedents, however, the goal of constitutional affirmative action remains attainable, and the DBE program is one such successful effort.

A. The DBE Program Is Supported By The Compelling Interest Of Remedying Identified Public and Private Discrimination

The first question on which this Court granted certiorari is "[w]hether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination." *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1598 (2001) (amending order granting petition for writ of certiorari). In deciding whether Congress had a compelling interest, the Court of Appeals properly divided its consideration into definitional and evidentiary stages. It asked, first, whether Congress's "articulated goal in enacting the race-based measures at issue in this case is appropriately considered a 'compelling interest.'" Pet. App. 24a. It then inquired "whether the actual evidence proffered by the government support[ed] the existence of [the] past and present discrimination" at which the challenged statute aimed. Pet. App. 28a. After careful analysis at both stages, it concluded that the DBE program was supported by a valid, well-substantiated compelling interest.

Petitioner challenges the Court of Appeals' conclusions at each stage. First, it mounts two attacks at the definitional stage. It argues both that there should never be any

compelling interest in race-conscious affirmative action programs, Pet. Br. 18-23, and that this Court's precedents define a "passive participant" requirement for engaging in affirmative action that should have led the lower court to reject all proffered evidence of purely private discrimination. *Id.* at 29 n. 21. Second, petitioner marshals a variety of arguments in an attempt to undermine the Court of Appeals' favorable assessment of the voluminous evidence proffered by the federal government. As *amici* demonstrate in the following two sections, petitioner's challenges fail at each stage.

1. Governments Have A Compelling Interest In Remedying Identified Private Discrimination, As Well As Identified Public Discrimination, Through Affirmative Action Programs

Amici will not address petitioner's first definitional challenge to the lower court's compelling interest analysis, which advocates a "colorblind" interpretation of equal protection that is well known to this Court and that has been rejected by a majority of the Court on many occasions. *Amici* do, however, squarely reject petitioner's assertion that this Court's precedents support a "passive participation" test that prevents governments from using affirmative action programs to remedy purely private discrimination.

This issue is important to *amici* because it has been a source of widespread confusion and error in the lower courts, including the Court of Appeals in this case. Although petitioner faults the Court of Appeals for not applying a "passive participant" requirement to exclude individual items of evidence of wholly private discrimination, the Court of Appeals in fact briefly reasoned that such a requirement had been satisfied, because it believed that this Court's precedents might support such a requirement. *See* Pet. App. 32a-33a.

While the court below ultimately concluded that this Court had not definitively addressed the issue, *see id.* at 32a, a

number of other circuits have erroneously concluded that private discrimination in which government is in no way involved cannot be remedied by means of affirmative action. *See, e.g., Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) ("[t]he municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a 'passive participant'"); *Hopwood v. Texas*, 78 F.3d 932, 950 (5th Cir.) ("the state's use of remedial racial classifications is limited to the harm caused by a specific state actor"), *cert. denied*, 518 U.S. 1033 (1996).

These cases conflict with decisions from other circuit courts that come to the opposite conclusion, and that, *amici* submit, are correctly decided. *See, e.g., Associated Gen. Contractors Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1413 n.10 (9th Cir. 1991) (stating that the opinions in *Croson* "appear[] implicitly to overrule our requirement . . . that to justify a race-based preference, 'the state or local government must be acting to remedy government-imposed discrimination'") (citations omitted), *cert. denied,* 503 U.S. 985 (1992); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (stating that affirmative action programs need not "be confined solely to the redress of state-sponsored discriminination"); *Tennessee Asphalt Co. v. Farris,* 942 F.2d 969, 974 (6th Cir. 1991) ("Governmental entities are not restricted to eradicating the effects only of their own discriminatory acts"). This Court should take the opportunity afforded by this case to end lower court confusion and reiterate in unmistakable terms that purely private identified discrimination may support narrowly tailored race-conscious governmental remedies.

a. In *Croson*, a majority of this Court concluded that governments have a compelling interest in remedying private discrimination within their jurisdictions (as well as prior

public discrimination) by means of race-conscious programs. *See* 488 U.S. at 492 (plurality opinion) (the City of Richmond "can use its spending powers to remedy private discrimination"); *id.* at 509 ("[i]f the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion"); *id.* at 538 (Marshall, J., dissenting) ("the interest in ensuring that the government does not reflect and reinforce prior private discrimination . . . is . . . compelling").

As the *Croson* plurality explained, this holding was not a departure from this Court's precedents, but entirely consistent with it. In particular, the *Croson* plurality demonstrated that a superficially inconsistent statement by the plurality in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), turned out on closer inspection to support the *Croson* holding. *See* 488 U.S. at 492. The *Wygant* plurality concluded that on the facts of that case, the "Equal Protection Clause required 'some showing of prior discrimination by the governmental unit involved.'" *Id.* (quoting 476 U.S. at 274) (plurality opinion)). Yet the layoff program at issue in *Wygant* dealt only with the internal employment policies of the Jackson Board of Education, and the plurality's statement was tailored to those facts. *See id.*

This Court's precedents demonstrate that, whereas general "societal discrimination" cannot support affirmative action programs, "identified discrimination" can support such programs, and "identified discrimination" may be public, private, or any combination of the two. Two passages, one in *Wygant* and the other in *Croson,* deserve particularly close examination, for they are the most likely sources of confusion, yet upon proper consideration provide crucial support for this conclusion.

First, in her opinion in *Wygant*, Justice O'Connor expressed her agreement with the *Wygant* plurality "that a governmental agency's interest in remedying 'societal' discrimination, *that is, discrimination not traceable to its own actions*, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) (emphasis added). To the casual reader, this comment may suggest that this Court recognizes only two types of discrimination—discrimination "traceable to [a government's] own actions" and "societal" discrimination—and that any discrimination that is not traceable to a government's own actions is mere societal discrimination, which cannot be addressed by race-conscious remedies.

The *Croson* plurality's elucidation of the potentially misleading language in the *Wygant* plurality opinion, however, applies with equal force to this passage. Since the *Wygant* Court was reviewing an internal employment policy of the Jackson Board of Education in light of lower court findings that "any statistical disparities [in the employment of minority teachers] were the result of general societal discrimination, not of prior discrimination by the Board," *Wygant*, 476 U.S. at 278 (plurality opinion), neither the plurality nor Justice O'Connor had any occasion to consider whether, or to assume that, the categories of "societal discrimination" and "discrimination traceable to the government's own actions" were exhaustive, and the *Croson* plurality confirms that they are not.

Rather, as the *Croson* plurality explains, the critical dichotomy is that between "'*societal discrimination*' which is an inadequate basis for race-conscious classifications, and the type of *identified discrimination* that can support and define the scope of race-based relief." *Croson*, 488 U.S. at 497 (plurality opinion) (emphasis added). In turn, "identified discrimination" can be either public or private, so long as there is evidence that renders it sufficiently distinct from the general history of discrimination within our society. *See id.* at 486 (explicitly rejecting Croson's argument that "the city must

limit race-based remedial efforts to eradicating the effects of its own discrimination").

The second likely source of confusion is the *Croson* plurality's counterfactual statement that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.* at 492. A cramped reading of this statement would be that "passive participation" was not merely sufficient to support affirmative action, but *necessary*, and that the "passive participation" requirement was satisfied only by contemporaneous support of discriminatory private actors.

Such a reading, however, is belied by the consistent formulation, in a portion of the *Croson* opinion joined by a majority and hence constituting the Court's holding, of the burden upon the City of Richmond to show only "identified discrimination in the Richmond construction industry," *id.* at 500, 505, not the City's own contemporaneous support of that discrimination.[2] If a market continues to be distorted by the effects of identified past private discrimination at the time a government enters that market, then surely at the time of entry the government becomes a "passive participant" in the perpetuation of those discriminatory effects, and can therefore craft a narrowly tailored program to remedy them. Thus, as *Croson* concludes, governments "may take remedial action when they possess evidence that their own spending practices

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[2] *See Croson*, 488 U.S. at 500 (rejecting proffered evidence as being "of little probative value in establishing identified discrimination in the Richmond construction industry"); *id.* at 505 ("none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry"); *see also id.* at 500 (concluding that there was insufficient evidence of discrimination "by *anyone* in the Richmond construction industry").

are exacerbating a pattern of *prior discrimination*, . . . public *or private*. . . ." *Id.* at 504 (emphasis added).

b. The conclusion that a government may use race-conscious measures to remedy purely private discrimination also fits perfectly within the broader spectrum of government interests and constitutional concerns identified by the Court. This Court has recognized repeatedly that governments have an interest of the highest order in enacting regulatory measures to eliminate private discrimination. *See, e.g., Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945). This Court has recognized, as noted above, that governments may formulate voluntary affirmative action programs to remedy their own past discrimination. *See, e.g., Wygant*, 476 U.S. at 274 (a "showing of prior discrimination by the governmental unit involved" may be sufficient to support "limited use of racial classifications in order to remedy such discrimination") (plurality opinion); *id.* at 286 (O'Connor, J., concurring).

Yet, in important respects, affirmative action programs to remedy private discrimination are on a stronger constitutional footing than either regulation of discriminatory private conduct or affirmative action targeted at a government's own past discrimination. First, affirmative action programs are an exercise of a government's spending power, rather than its regulatory power. Thus, such programs always seek not only to combat private discrimination, but to ensure that the government's own spending decisions are not supporting subtle forms of discrimination or perpetuating the effects of past discrimination. This Court has recognized that a government has unusually wide latitude to promote its interests when it is not acting in a regulatory capacity but is, for example, "expend[ing] only its own funds in entering into construction contracts for public projects." *White v. Massachusetts Council*

of Constr. Employers, 460 U.S. 204, 214-15 (1983); *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) ("the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake"); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding viewpoint-discriminatory limitations on speech as conditions of government funding); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

When, as in adopting an affirmative action program, government is attempting to avoid supporting private racial discrimination and its effects, the government's spending power is at its zenith. As the *Croson* plurality put it, "[i]t is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492.

Second, affirmative action programs targeted at private discrimination are less likely to burden innocent nonminorities than programs targeted at a government's own prior discrimination. The burden that affirmative action programs place on innocent nonminorities has consistently been central to this Court's constitutional calculus. *See, e.g., United States v. Paradise*, 480 U.S. 149, 182 (1987) (plurality opinion) (inquiring whether the challenged provisions "impose[d] an unacceptable burden on innocent third parties"); *Wygant*, 476 U.S. at 276 (plurality opinion) (expressing a concern about "discriminatory *legal* remedies that work against innocent people") (emphasis omitted); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978) (opinion of Powell, J.) (race-based remedial benefit programs "usually remai[n] subject to continuing oversight to assure that [they] will work the least harm possible to other innocent persons competing for the benefit").

If government discrimination forms the entire basis for a program, nonminority individuals who are burdened by the program must be presumed to be innocent of any discriminatory conduct (though, importantly, they may still have benefitted from the government's discrimination). By contrast, evidence of private discrimination may show that individuals burdened by an affirmative action program may likely have actually participated in causing the injuries that the program seeks to remedy. Thus, programs predicated on private discrimination are less likely to burden innocent third parties than programs directed entirely at public discrimination.

In sum, affirmative action programs targeting private discrimination raise less serious constitutional concerns than affirmative action programs targeting public discrimination. Since the latter are unquestionably constitutional, the constitutionality of remedying private discrimination with affirmative action would seem to follow *a fortiori*.[3] Yet many courts have neither accepted this logic nor found adequate guidance in this Court's direct statements on the issue. The Court should take this opportunity to put the issue to rest by stating clearly that affirmative action programs may constitutionally target purely private discrimination.

[3] Allowing governments to remedy private discrimination does give rise to the remote possibility that more than one level of government with jurisdiction over the same territory might devise a program to remedy the same discriminatory conduct, potentially resulting in overremediation. But that danger can be addressed by requiring governments with overlapping jurisdiction to take account of each other's efforts to remedy such discrimination. To tie the hands of all governments in advance because of the mere possibility that more than one of them might reach out to remedy a grave social problem is surely to overreact to a potential need for coordination.

2. *The DBE Program Is Supported By And Designed To Require Strong Evidence Of Identified Discrimination In Relevant Contracting Markets*

The evidence proffered by the federal government to support the DBE program is wide-ranging and voluminous, and *amici* cannot engage in a type-by-type, study-by-study, hearing-by-hearing rebuttal of petitioner's scattershot challenges. However, *amici* do wish to advance two particular arguments in support of the Court of Appeals' determination that Congress had adequate evidence of identified discrimination to enact the DBE Program.

First, the DBE program's design intentionally and responsibly defers a portion of the potential evidentiary burden on Congress to post-enactment stages. Legislatures often incorporate individualized inquiries and procedures into affirmative action program design, or delegate authority to administrative agencies to incorporate such inquiries and procedures and to fine-tune a program in other respects. In this instance, the DBE program incorporates a variety of important individualized inquiries and procedures. One particularly significant example is a requirement that each government agency that receives program funding set its own goal for DBE participation by examining local market data. *See* 49 C.F.R. § 26.45 (2000); Pet. App. 67a-68a (discussing local goal-setting requirement).[4] That local goal must reflect "the availability of ready, willing and able DBEs relative to all

[4] Other individualized inquiries incorporated into the DBE program include a provision allowing individual nonminorities to demonstrate that they qualify for DBE status, *see* 49 C.F.R. § 26.67(d) (2000); a provision making available proceedings to rebut presumptions of minority qualification in individual cases, *see id.* § 26.67(b); and a requirement that each individual applicant for DBE certification "submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged." *Id.* § 26.67(a).

businesses ready, willing and able to participate" in local projects funded under the DBE program. 49 C.F.R. § 26.45(b). Thus, the DBE program incorporates exactly the type of inquiry contemplated by *Croson*, which indicates that remedial efforts might be justified when there is "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors." *Croson*, 488 U.S. at 509 (plurality opinion).

Of course, individualized inquiries and procedures such as local goal-setting greatly aid an affirmative action program to meet the constitutional requirement of narrow tailoring, as discussed in more detail below. But under a proper analysis, they should also lessen the government's burden of producing general evidence to support the program.[5] If, for example, Congress were to enact a rigid, nationwide quota for minority participation in federal contracting, it would have a heavy burden to demonstrate that discrimination against minority contractors was uniform across the country, and that absent such discrimination minority contractors in each local market would have been awarded at least that percentage of awarded

[5] The reason why the "compelling interest" and "narrow tailoring" analyses are not entirely distinct is straightforward. It is often convenient to refer to the purpose of a law by means of a summary verbal formula, and then ask whether a legislature had evidence to support a need for that effort as summarily formulated. A more complete description of a law's purpose, however, usually must take into account the detailed ways in which the law in fact defines its beneficiaries and confers benefits upon them. Here, although one might concisely summarize the DBE program's purpose as "remedying identified discrimination in highway contracting," another somewhat more illuminating abridgement is "remedying such identified discrimination as *may be* found by local recipients in their goal-setting inquiries." The evidence needed to justify such ongoing inquiries is surely different than the evidence needed to justify a sweeping advance conclusion.

contracts equal to the legislated quota. *Cf. Croson*, 488 U.S. at 499-500 (reviewing five findings advanced in support of Richmond's fixed 30% quota, and concluding that they did not provide the city with "'a strong basis in evidence for its conclusion that remedial action was necessary'") (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). By contrast, when a program requires minority participation goals to be set at a local level based on ongoing factfinding, as does the current DBE program, the initial factfinding process is relieved of some of the burden of supporting the program.

To be sure, the government must still present strong initial evidence of past or present discrimination against minorities that hinder them in competing in the industries supported by government contracting programs. In this case, however, Congress has done that, and at the same time has wisely allocated some of the factfinding for, and tailoring of, the program to post-enactment processes.

Second, petitioners erroneously contend that the government must show discrimination in highway contracting "in at least a majority of states." Pet. Br. 33. This proposed requirement is without legal or factual basis. As an initial matter, the cases that petitioner cites in support of a state-by-state requirement are irrelevant to the exercise of the federal government spending power at issue here. Those cases all concern the abrogation of state sovereign immunity, the preemption of state law, or the direct regulation of traditionally state-regulated private non-economic behavior. *See* Pet. Br. 33; *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (abrogation of state sovereign immunity under the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (direct regulation of private non-economic behavior under the Violence Against Women Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (abrogation of state sovereign immunity under the Age Discrimination in Employment Act); *Florida Prepaid Post-*

secondary Ed. Exp. Bd. v. College Savings Bank, 527 U.S. 627 (1999) (abrogation of state sovereign immunity under the Patent and Plant Variety Protection Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (preemption of state law under the Religious Freedom Restoration Act of 1993).

As associations of state and local government officials, *amici* would have serious concerns about any exercise of federal power that encroached on state prerogatives. Yet the federal law at issue here does nothing of the sort. The MBE program leaves state sovereign immunity intact; leaves state and local laws untouched; and leaves traditionally state-regulated private behavior free of novel federal penalty. As noted above, the MBE program is an exercise of the spending power, and seeks only to ensure that monies drawn from federal coffers do not perpetuate identified racial discrimination or its effects. Because the MBE program does not encroach on any state interest, the cases cited by petitioner do not support a requirement of state-by-state findings.

Moreover, even if these cases had some relevance here, none of them supports petitioner's curious formulation of its own rigid quota, namely that Congress must find discrimination in more than twenty-five States. This Court has never formulated a majority head-count rule to decide issues of federal legislative power concering the States, and there is no reason for it to formulate one to determine federal power with regard to individuals seeking federal funds. Of course, an isolated finding of discrimination in a market at one end of the continent provides little support for a remedial program at the other end. Petitioners do not allege, however, that the voluminous evidence compiled by Congress was confined to a particular region. And it is worth repeating that the DBE program's incorporation of local goal-setting by individual recipients, *see* 49 C.F.R. § 26.45 (2000), guarantees that Congress's initial factfinding will be supplemented by local

market factfinding before any individual nonminority contractor is burdened by an award of a contract to a certified DBE. Thus, petitioner's arguments challenging the distribution of supporting evidence among the States lack both legal and factual support.

B. The DBE Program is Narrowly Tailored To Remedy Identified Discrimination

Both the design of the DBE program and its legislative history demonstrate that the program is narrowly drawn to remedy otherwise unremediable injuries caused by identified discrimination. Thus, the second question on which this Court granted certiorari—whether the "current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest," *Adarand v. Mineta*, 121 S. Ct. at 1598 (amending order granting petition for writ of certiorari)—must be answered in the affirmative. Before specifically considering program elements and legislative context, however, it is worth recalling what "narrow tailoring" must mean in the context of affirmative action, and how that meaning is tied to the constitutional goal of equal protection.

Affirmative action programs do not render perfect justice. Minorities benefitted by an affirmative action program were not necessarily suffering from past or present discrimination in exactly the same degree as the program turns out to benefit them. Nonminorities burdened by an affirmative action program have not necessarily either practiced discrimination or benefitted from discrimination in exactly the same degree as the program turns out to burden them. In the face of this manifest imperfection, it is important to articulate why a majority of this Court has consistently concluded that the "narrow tailoring" requirement leaves room for well-crafted affirmative action—why, that is, that "as part of this Nation's dedication to eradicating racial discrimination, innocent

persons may be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 280-81 (plurality opinion). The critical concern implicit in this conclusion is not a concern for groups, but for individuals—the individual victims of racial discrimination.

All plausibly constitutional affirmative action programs are predicated on strong evidence of identified, unremedied, and otherwise unremediable discriminatory injuries to individuals. The existence of such individual injuries is the key to understanding the justice and constitutionality of affirmative action. If this Court categorically rejects affirmative action, it leaves the individual victims of discrimination to suffer the full harm of their injuries with no hope that justice will ever be done. Thus, the judgment that narrowly tailored affirmative action programs are not just consistent with, but indeed promote, the guarantee of equal protection, is grounded on the recognition that controlled imperfect justice is better than no justice at all.

To be sure, poorly formulated and inadequately substantiated affirmative action programs may "impose the entire burden of achieving racial equality on particular [nonminority] individuals, often resulting in serious disruption of their lives," *Wygant*, 476 U.S. at 283, and thus cannot be held consistent with the Constitution's guarantee of equal protection. Yet a complete ban on affirmative action in the face of identified discrimination is certain to "impose the entire burden of achieving racial equality on particular individuals," namely, the individual minority victims of discrimination. The resulting disruption to their lives is no rarer or less. The Constitution should not be read to shackle governments seeking to lift part of that burden.

This articulation of the rationale for affirmative action programs underlies this Court's promise in *Adarand I* that strict scrutiny is not fatal to affirmative action. The promise is made to governments, but its ultimate beneficiaries are the

individual victims of discrimination. The care of those individuals, entrusted by the Constitution to this Court and those governments, is the ultimate issue in this case. This Court can and should discharge that trust by finding that the DBE program meets realistically attainable standards of narrow tailoring, including standards requiring the consideration of alternative race-neutral remedies, prohibiting undue burdening of nonminorities, and mandating durational limits on the use of affirmative action.

1. Both the supporting evidence for and ongoing implementation of the DBE Program exhibit ample "'consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Adarand I*, 515 U.S. at 237-38 (quoting *Croson*, 488 U.S. at 507). In *Adarand I*, this Court commented on an apparent lack of judicial inquiry into whether there had been such consideration. *See id.* On remand, the United States presented extensive evidence of Congress's efforts to remedy the problem with race-neutral means over a twenty-five year period before it first enacted an affirmative action program for federal contracting in 1978. *See* Pet. App. 194a-195a (opinion of district court). These ultimately unsuccessful efforts included anti-discrimination legislation, executive action to remedy employment discrimination in federal contracting, race-neutral contracting preferences for socially and economically disadvantaged businesses, and federal support of sureties that issue bonds to small businesses. *See id.* The district court found that this quarter-century-long effort sufficiently demonstrated consideration of race-neutral means. *See id.* at 196a.

Petitioner did not challenge this finding in the Court of Appeals, *see* Pet. App. 57a, and petitioner's unsupported assertion in its brief in this Court that Congress did not try race-neutral alternatives, *see* Pet. Br. 46, ignores both the district court's finding and petitioner's failure to challenge it.

Nor have Congressional efforts to use race-neutral means abated. Congress has continued to legislate to strengthen antidiscrimination law and its enforcement. For example, in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), Congress amended 42 U.S.C. § 1981 to remove the limiting construction of this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that the statute's prohibition on discrimination in contracting did not apply to conduct occurring after contract formation. *See* Civil Rights Act of 1991 § 101, 105 Stat. at 1071-72; *see also id.* §§ 110, 111, 102 Stat. at 1078 (expanding technical assistance, training, education, and outreach efforts). Current materials published by the Small Business Administration reveal a wealth of continued and augmented efforts to provide race-neutral aid to small businesses seeking to enter the federal contracting market. *See, e.g.*, U.S. Small Business Administration, *Washington D.C. Small Business Resource Guide* (2001 edition) 28-29 (describing the SBA's Surety Bond Program, Prime Contracts Program, Subcontracting Assistance Program, Certificate of Competency Program, and Size Determination Program).

The mandate to prefer race-neutral remedies is also extended by the DBE Program to program recipients, which are required to use race-neutral means to the maximum extent possible in meeting their local market goals for minority participation. *See* 49 C.F.R. § 26.51 (2000). These race-neutral means include redesigning and simplifying the bidding process to facilitate increased participation by small businesses, *see id.* § 26.51(b); assisting small businesses in obtaining bonding and financing, *see id.* § 26.51(b)(2); providing advice and support regarding management, accounting, and business development, *see id.* §§ 26.51(b)(5), 26.51(b)(6); and establishing programs to assist new firms, "particularly in fields" with "historically . . . low" minority participation. *See id.* § 26.51(b)(7). To the extent that race-neutral measures are successful in pursuing local market goals, administering

authorities must cease use of race-based contract subsidies and goals. *See id.* § 26.51(f).

Thus, the DBE program design requires ongoing efforts to consider and implement race-neutral means of encouraging minority participation. A recent General Accounting Office report found that surveyed DBE program recipients were able to achieve, on average, one-third of their program goals for fiscal year 2000 through the use of race-neutral means. *See* U.S. General Accounting Office, Report to Congressional Committees, *Disadvantaged Business Enterprises: Critical Information Is Needed To Understand Program Impact*, Pet. Br. App. 22 (June 2001). Although the consideration of race-neutral alternatives is often thought of as a pre-enactment legislative activity, such ongoing efforts by local authorities to reduce reliance on race-based contractual provisions are an even better means of ensuring that the injuries redressed by affirmative action programs are unremediable by any other means.

2. The DBE program prominently features a number of elements that ensure that it "does not unnecessarily trammel the interests" of nonminority contractors. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Most importantly, the advantages the DBE program distributes—future opportunities to obtain government contracts—are not the subject of settled expectations by individuals who do not receive them. Thus, they are more like hiring goals, which "impose a diffuse burden, often foreclosing only one of several opportunities," than layoff plans, which "often result[] in serious disruption of [workers'] lives." *Wygant*, 476 U.S. at 283 (plurality opinion). In addition, the program does not rely on inflexible quotas that bar nonminorities from competing for a certain percentage of contracts. Rather, it pursues aspirational goals by means of a capped subsidy that limits the relative disadvantage that can be visited upon nonminorities and circumscribes the financial

incentive to hire DBEs. *See* Pet. App. 70a (discussing the structure of the subsidy caps).

3. Finally, there is little danger that the use of race-based preferences under the DBE program "'will . . . last longer than the discriminatory effects [they are] designed to eliminate.'" *Adarand I*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). As noted above, DBE program design assures that, as federal contracting participation by ready, willing, and able DBEs approaches their proportionate availability in local markets, the use of race-based participation incentives will cease. *See* 49 C.F.R. § 26.45(b) (2000) (detailing how local participation goals are to be set); *id.* § 26.45(f) (phasing out race-based contract goals as they cease to be needed to meet participation goals). Congress has also demonstrated its commitment to ongoing review of the need for and efficacy of the DBE program. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §1101(b)(6), 112 Stat. 107, 114-15 (1998) (requiring the Comptroller General to prepare and present to Congress within three years a comprehensive report on the DBE program). Thus, the DBE program contains ample safeguards assuring that the use of race-based remedies will be discontinued when no longer necessary.

In sum, Congress and the Department of Transportation have designed the DBE program to respond specifically to the abundantly evident problem of identified discrimination in federal contracting markets. They have incorporated a wide variety of safeguards to address the concerns enunciated by this Court in its affirmative action cases, most particularly its pronouncements in *Croson* and *Adarand I*. If the standards set forth in these cases are realistically attainable, then the current DBE program meets them. Thus, this Court should uphold the DBE program, and thereby allow governments to continue to use carefully designed and substantiated affirmative action programs to address the otherwise unremediable injuries suffered by victims of discrimination.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RECEIVED

No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

PETITIONER,

v.

NORMAN Y. MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF SENATOR MAX BAUCUS, ET AL., *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE OF THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. CONGRESS HAS A COMPELLING INTEREST IN REMEDYING DISCRIMINATION IN GOVERNMENT CONTRACTING 4

A. Because Congress Legislates At A National Level, The Evidence It Considers Is National In Scope 5

B. Strict Scrutiny Does Not Require This Court To Abandon Its Traditional Respect For Congress' Factual Findings 8

C. Strict Scrutiny Does Not Limit Congress To Considering Only A Narrow, Particular Class Of Evidence 10

D. Congress Had A Strong Basis in Evidence For Concluding That Construction Contracts Were Affected by Race And Gender Discrimination 13

1. Congress Has Gathered Compelling Evidence Of Discrimination 13

2. Petitioner's Brief Misstates The Nature And Scope Of The Evidence Considered By Congress 16

II. THE STATUTES AT ISSUE IN THIS CASE ARE NARROWLY TAILORED TO FURTHER THE COMPELLING INTEREST IDENTIFIED BY CONGRESS 21

A. Congress Can Leave Details Of Implementation To Executive Branch Agencies 21

B. The Statutory Goals Are Narrowly Tailored 22

C. The Race and Gender-Conscious Presumptions Are Narrowly Tailored 24

1. Congress Reasonably Concluded That A Presumption Is Necessary 25

2. The Presumption Can Be Applied In A Constitutional Way 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 12

Adarand Constructors, Inc. v. Pena,
965 F. Supp. 1556 (D. Colo. 1997) 13

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) ..... *passim*

Adarand Constructors, Inc. v. Slater,
228 F.3d 1174 (10th Cir. 2000) 16, 18, 25

Board of Trustees of the Univ. of Alabama v. Garrett,
121 S. Ct. 955 (2001) 9

Bush v. Vera,
517 U.S. 952 (1996) 12

Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.,
467 U.S. 837 (1984) 28

City of Boerne v. Flores,
521 U.S. 507 (1997) 9

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) ..... *passim*

Florida Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 12

Fullilove v. Klutznick,
448 U.S. 448 (1980) ..... *passim*

Katzenbach v. Morgan,
384 U.S. 641 (1966) 9

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,
478 U.S. 501 (1986) 26

Nixon v. Shrink Missouri Government PAC,
528 U.S. 377 (2000) 11, 12

Oregon v. Mitchell,
400 U.S. 112 (1970) 7

South Carolina v. Katzenbach,
386 U.S. 301 (1966) 9

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 26

Turner Broadcasting System v. FCC,
520 U.S. 180 (1997) 11

United States v. Mead Corp.,
121 S. Ct. 2164 (2001) 28, 29

United States v. Shimer,
367 U.S. 374 (1961) 28

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 13

STATUTES

13 C.F.R. § 124.1002 (2000) 27, 28
13 C.F.R. § 124.1008 (2000) 27, 28
13 C.F.R. § 124.1016 (2000) 27
13 C.F.R. § 124.1017 (2000) 27
48 C.F.R. § 19.703 (2000) 27
49 C.F.R. § 26.15 (2000) 24
49 C.F.R. § 26.41 (2000) 23
49 C.F.R. § 26.43 (2000) 24
49 C.F.R. § 26.45 (2000) 23
49 C.F.R. § 26.47 (2000) 24
49 C.F.R. § 26.51 (2000) 24
49 C.F.R. § 26.61 (2000) 28
49 C.F.R. § 26.67 (2000) 27, 28
49 C.F.R. § 26.83 (2000) 27
49 C.F.R. § 26.87 (2000) 27

Intermodal Surface Transportation Efficiency Act of 1991,
Pub. L. 102-240, 105 Stat. 1919 23

Public Works Employment Act of 1977,
Pub. L. 95-28, 91 Stat. 116 ..... 14, 15

Transportation Equity Act for the 21st Century,
Pub. L. 105-178, 112 Stat. 107 (1998) 17, 23, 29

LEGISLATIVE HISTORY

144 Cong. Rec. H2001 (Apr. 1, 1998) 24
144 Cong. Rec. H2003 (Apr. 1, 1998) 24
144 Cong. Rec. H2004 (Apr. 1, 1998) 24
144 Cong. Rec. H2006 (Apr. 1, 1998) 18
144 Cong. Rec. H2008 (Apr. 1, 1998) 24
144 Cong. Rec. H2009 (Apr. 1, 1998) 24
144 Cong. Rec. H2010 (Apr. 1, 1998) 18, 24
144 Cong. Rec. H2011 (Apr. 1, 1998) 18, 24
144 Cong. Rec. H3957 (May 2, 1998) 19
144 Cong. Rec. H3958 (May 2, 1998) 19
144 Cong. Rec. H3959 (May 2, 1998) 19
144 Cong. Rec. H3960 (May 2, 1998) 19

144 Cong. Rec. S1401 (Mar. 5, 1998) 9, 17, 24
144 Cong. Rec. S1402 (Mar. 5, 1998) 9, 24, 29
144 Cong. Rec. S1403 (Mar. 5, 1998) 9
144 Cong. Rec. S1404 (Mar. 5, 1998) 9, 17
144 Cong. Rec. S1408 (Mar. 5, 1998) 9, 24
144 Cong. Rec. S1409 (Mar. 5, 1998) 9, 17
144 Cong. Rec. S1410 (Mar. 5, 1998) 9
144 Cong. Rec. S1419 (Mar. 5, 1998) 9
144 Cong. Rec. S1420 (Mar. 5, 1998) 9, 17
144 Cong. Rec. S1421 (Mar. 5, 1998) 9
144 Cong. Rec. S1422 (Mar. 5, 1998) 18
144 Cong. Rec. S1423 (Mar. 5, 1998) 24
144 Cong. Rec. S1424 (Mar. 5, 1998) 9
144 Cong. Rec. S1425 (Mar. 5, 1998) 9, 24
144 Cong. Rec. S1426 (Mar. 5, 1998) 9, 17
144 Cong. Rec. S1427 (Mar. 5, 1998) 9
144 Cong. Rec. S1428 (Mar. 5, 1998) 9, 24
144 Cong. Rec. S1430 (Mar. 5, 1998) 18, 24

144 Cong. Rec. S1433 (Mar. 5, 1998) 24
144 Cong. Rec. S5414 (May. 22, 1998) 18

61 Fed. Reg. 26042 (May 23, 1996) ..... *passim*
63 Fed. Reg. 35714 (June 30, 1998) 19, 20
64 Fed. Reg. 5096 (Feb. 2, 1999) 29
64 Fed. Reg. 52806 (Sept. 30, 1999) 20

H.R. Rep. No. 100-736 (1988) 9, 18

GAO Report to Congressional Committees:
Disadvantaged Business Enterprises,
Critical Information is Needed to
Understand Program Impact (June 2001) 20, 21

OTHER AUTHORITY

1 *Weinstein's Federal Evidence* (2d ed. 2000) 29

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of certain individual members of the United States House and Senate (the "Congressional Amici") as amici curiae.[1] The Congressional Amici have a strong interest in affirming the constitutionality of the statutory scheme underlying the United States Department of Transportation's current affirmative action programs for construction projects. We believe that this statutory scheme is a constitutionally permissible authorization to the Department of Transportation ("DOT") to take steps to remedy egregious and documented discrimination against small disadvantaged business enterprises ("DBEs") in federal and federally-assisted contracting.

We have a more general interest in ensuring that the federal government has the authority and flexibility necessary to continue to make meaningful progress in our Nation's quest for racial equality, both in DOT and other programs implemented by the Executive Branch. We are aware that DOT has engaged in extensive efforts to devise regulations that comply with this Court's guidance regarding the constitutional requirements for race- and gender-conscious remedies for discrimination. While the focus of the brief is the statutory framework and, therefore, does not take a position on the regulations at issue in this case, some of the amici have reviewed these regulations, including the extensive reforms which DOT has implemented since 1998, and have concluded that these regulations meet constitutional requirements. If this Court discerns a constitutional defect in one or more of DOT's

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[1] A list of these individual members of Congress is included in the appendix to this brief. Counsel for the Congressional Amici were the sole authors of this brief. No person or entity other than the Congressional Amici made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the filing of this brief. These consents have been filed concurrently with this brief.

implementing regulations, we respectfully urge the Court to make clear that the underlying statutory framework remains constitutionally sound.

SUMMARY OF THE ARGUMENT

When this Court first considered this case, it held that "strict scrutiny" applies to all racial classifications employed by any governmental entity. It also stated that strict scrutiny is not necessarily "fatal in fact" and that race-conscious remedial programs are constitutional if they are narrowly tailored to further the compelling interest of remedying the effects of identified racial discrimination. The statutory scheme at issue in this case meets these requirements.

As this Court has explained, the proper application of strict scrutiny respects the important institutional differences between the United States Congress and other governmental institutions such as state agencies and local city councils. Race-conscious measures undertaken by the federal government must be narrowly tailored to achieve a compelling interest; but, as the national legislature, Congress is entitled to identify that interest and tailor its statutory response at a level of generality appropriate to nationwide legislation. Thus, when deciding whether the problems it confronts are national in scope, Congress may consider nationwide rather than local evidence. Congress may also authorize nationwide programs and, within appropriate constitutional limits, entrust the narrow tailoring of these programs to the Executive Branch. For example, Congress may enact a statute authorizing a race- or gender-conscious remedy in all areas of the country even if evidence shows that, at a particular time, the effects of discrimination are present only in certain areas of the country. The Executive Branch agencies may then tailor the program to address areas of the country where those effects are present. Congress may also determine that

certain groups have presumptively been affected by discrimination based on their race or gender and authorize Executive Branch agencies to employ the presumption only under appropriate circumstances. In reviewing these statutes, the role of the courts is to determine whether these statutory authorizations can be applied in a constitutional manner. If so, the statutes are constitutional.

Under an appropriate application of strict scrutiny as applied to national legislation, the statutes underlying DOT's affirmative action programs are constitutional. Congress had far more than the "strong basis in evidence" required by this Court when it concluded, repeatedly over the past two decades, that minority-owned contracting firms have faced substantial discriminatory barriers to fair and equal participation in federal contracting simply because of their race. Furthermore, Congress has more recently gathered strong evidence showing that women-owned firms are adversely affected by discrimination in their efforts to become competitively viable. Many of the same factors that hamper the growth of minority-owned firms harm women-owned firms as well.

The statutes authorizing DOT's affirmative action programs provide sufficient discretion to DOT to implement remedies that are narrowly tailored to address this history of discrimination in a manner that is sensitive to the differences between the various regions of this country. These statutes set modest aspirational goals for participation by small minority- and women-owned firms. Moreover, they permit implementing officials to modify—or disregard—those goals if local or individual circumstances show that they are not needed or that achieving them would involve inappropriate costs. The statutes also provide a presumption regarding groups that have been adversely affected based on race or gender. They permit Executive Branch officials to apply this presumption in a flexible way

and to disregard it under appropriate circumstances. Moreover, the statutes do not require any implementing Executive Branch agency or recipient of federal funds to employ a quota or set-aside.

Because these statutes are narrowly tailored to further Congress' compelling interest in—indeed, responsibility for—remedying the persistent and egregious discrimination against minority-owned firms in federal contracting, the Congressional Amici respectfully urge this Court to affirm the judgment of the Tenth Circuit Court of Appeals.

ARGUMENT

I. CONGRESS HAS A COMPELLING INTEREST IN REMEDYING DISCRIMINATION IN GOVERNMENT CONTRACTING

When this Court first had the opportunity to consider this case, it made clear that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("*Adarand I*"). The current statutory regime satisfies this test.

Remedying and eradicating the effects of past and present racial discrimination is indisputably an appropriate and compelling justification for legislative action. As this Court explained in *Adarand I*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." 515 U.S. at 237. That interest includes a compelling responsibility to ensure that public funds appropriated and spent by Congress are not used to finance and entrench a system of private discrimination. *See*

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").

A. Because Congress Legislates At A National Level, The Evidence It Considers Is National In Scope

As the national legislature, Congress has a unique role in our constitutional structure. It has greater responsibilities than State and local governments and different institutional strengths in carrying them out. Because of its unique authority to identify nationwide problems and craft nationwide solutions, Congress necessarily reviews evidence and legislates at a higher level of generality than a State or locality. Although this Court has held that race-conscious remedial action undertaken by Congress is subject to the same "strict scrutiny" as similar programs undertaken by State and local governments, *see Adarand I*, 515 U.S. at 235, the Court has never suggested such scrutiny requires a reviewing court to ignore the important institutional and jurisdictional differences between Congress and other government institutions. Petitioner's suggestion that Congress is required to compile local disparity studies for every community nationwide before authorizing a national program, *see* Pet.'s Br. at 33-34, has no basis in this Court's precedents and shows a profound lack of understanding of Congress' constitutional role.

It is neither appropriate nor practicable to require Congress, in enacting national legislation, to investigate and make detailed findings regarding the justification and expected consequences of this legislation in every community that may be affected. If such narrow local findings were required before Congress could employ a

race- or gender-conscious remedy to redress identified, nationwide discrimination, Congress could not, as a practical matter, act at all. Consequently, only States and localities could employ such remedies—a result which is directly contrary to the letter and spirit of the Fourteenth Amendment. *Cf. Croson*, 488 U.S. at 521-22 (Scalia, J., concurring) ("[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed.") (citing U.S. Const. amends. 14, § 5 and 14, § 1, respectively).

As this Court has repeatedly recognized, even the most searching judicial scrutiny should be applied in a manner that takes account of Congress' uniquely national responsibilities and authority. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), a plurality carefully reviewed the legislative history of the initial version of the current program and concluded that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination," and that "Congress acted within its competence to determine that the problem was national in scope." 448 U.S. at 477-78 (Burger, C.J.). The evidence relied upon by Congress in making that determination included nationwide statistics gathered by federal agencies about past experience with federal contracting, locality-specific evidence of discrimination in "state and local construction contracting," *id.* at 478, and testimony and anecdotal evidence presented to congressional committees. *See id.* at 457-68, 477-78 (Burger, C.J.); *see also id.* at 503-06 (Powell, J., concurring) (finding, upon a review of the legislative record, that "Congress reasonably concluded that private and governmental

discrimination had contributed to the negligible percentage of public contracts awarded [to] minority contractors").

In *Croson*, this Court again acknowledged that the national scope of Congress' responsibilities distinguished its authority from that of State and local governments, whose laws cannot reach beyond their limited geographical jurisdictions. 488 U.S. at 489-91. As Justice O'Connor explained, "Congress may identify and redress the effects of society-wide discrimination," *Id.* at 490, and the evidence relevant to its use of race-conscious measure is therefore inherently and inescapably different. "[O]ther governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.'" *See id.* at 489 (O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 515-16 n.14 (Powell, J., concurring)); *cf. Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (Black, J.) (unanimously upholding Congress' authority to apply provisions of the Voting Rights Act nationwide without making state-by-state findings).

The fact that Congress appropriately considers nationwide evidence when identifying nationwide problems, however, does not mean that a reviewing court must ignore local differences when considering the specific application of a congressional policy. *See, e.g., Croson*, 488 U.S. at 504 ("By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area."); *Fullilove*, 448 U.S. at 514 (Powell, J., concurring) ("Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population.

To meet this concern, Congress enacted a waiver provision....").

B. Strict Scrutiny Does Not Require This Court To Abandon Its Traditional Respect For Congress' Factual Findings

The evidence supporting Congress' findings of persistent and egregious discrimination in this case is so overwhelming, *see* Section II *infra*, that this Court need not decide the precise extent of deference owed to Congress' factual findings, either generally or in the specific context of Congressional remedies for racial discrimination. It is clear that the required "strong basis in evidence" for Congress' findings exists in this case even if this Court gives Congress the same deference it gives to fact-finding by State and local legislative bodies.

If it should reach the issue, however, this Court should recognize at a minimum that the proper application of strict scrutiny does not require it to abandon its traditional respect for Congress' unique constitutional position as a coequal branch of government, or its sensible recognition that the fact-gathering resources of Congress and the information that it properly considers when considering legislation far exceed those available to any reviewing court. *See, e.g., Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring) (Congress' "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue."). Furthermore, given Congress' constitutional obligation to address and redress racial discrimination in this country, the degree of judicial deference paid to its factual findings in this area has traditionally been greater than that afforded to the States. *See, e.g., Croson*, 488 U.S. at 487-92. That respect is particularly appropriate where, as here, the subject matter involves our Nation's continuing struggle with the effects of past and present racial

discrimination. Congress, "unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. This Court has consistently recognized that "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

When considering whether Congress has compiled a sufficient record to support the abrogation of a State's sovereign immunity under the Eleventh Amendment, this Court has cited as an example of substantial congressional fact-finding the evidentiary record which Congress amassed over the past thirty years demonstrating a pattern of egregious racial discrimination in regard to voting in this country. *See, e.g., Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 967-68 (2001) (noting the "'great care'" with which Congress "documented a marked pattern of unconstitutional action by the States" in discriminating against minority voters) (relying on *South Carolina v. Katzenbach*, 383 U.S 301, 308, 312 (1966)); *see also City of Boerne v. Flores*, 521 U.S. 507, 530-33 (1997) (also citing *Katzenbach*). Here, Congress has likewise built a substantial record concerning the prevalence and persistence of racial discrimination within the construction industry prior to enacting the legislation which is at issue in this case. All of this evidence has been thoroughly considered and analyzed through countless hearings, studies, and debates. *See, e.g.*, 61 Fed. Reg. 26042, 26051-52 & n.12 (May 23, 1996); H.R. Rep. No. 100-736, at 7-57 (1988); 144 Cong. Rec. S1401-04, S1408-10, S1419-21, S1424-28 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, Kerry, Wellstone, Mosely-Braun, and Domenici).

Petitioner argues that Congress is entitled to a lesser degree of judicial deference because it is not acting on the basis of its power under Section 5 of the Fourteenth Amendment. *See* Pet.'s Br. at 22-23 & n.15. Whether or not Section 5 applies to the various Congressional actions at issue here depends in part on how this Court ultimately decides to frame the scope of Petitioner's challenge.[2] Whether or not Section 5 technically provided Congress the authority for the particular statutes under review in this case, the core factual findings of discrimination in the contracting industry at issue here have been repeatedly made by Congress in contexts where it was unquestionably exercising its unique authority under that Section. *See, e.g.*, *Croson*, 488 U.S. at 504 (recognizing that, in enacting the MBE program upheld in *Fullilove*, "Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination"). Congress is not required to forget the facts it has gathered and the conclusions it has drawn when it moves on to a new statute. *Fullilove*, 448 U.S. at 502-03.

C. Strict Scrutiny Does Not Limit Congress To Considering Only A Narrow, Particular Class Of Evidence

Petitioner also argues that Congress is not entitled to consider any evidence other than statistical studies meeting four arbitrary "criteria" when determining whether a compelling interest in remedying racial discrimination exists. *See* Pet.'s Br. at 28-33. Petitioner further contends

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[2] In particular, Petitioner appears to argue that only Federal Executive Branch contracting is at issue, not DOT's program providing grants to States and localities. *See* Pet.'s Br. at 15-17 & n.10. The Congressional Amici do not take a position on the various standing, law of the case, and waiver issues associated with this argument.

that Congress cannot conclude that a problem is nationwide in nature, and therefore amenable to a nationwide remedy, unless it identifies strong evidence of that problem "in at least a majority of States." *Id.* at 33-34. Neither of these arbitrary limits on Congressional authority has any foundation in this Court's precedents, and both are incompatible with the legislative process and Congress' unique position in our constitutional system.

This Court has never suggested that Congress may consider only statistical evidence—and then only statistical evidence satisfying certain arbitrary study-design criteria laid down by the federal courts—when studying critical national issues like the ongoing presence and effects of racism in our society. To the contrary, the Court has appropriately recognized that "[t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary," *Croson*, 488 U.S. at 500, and that Congress is far better positioned than the courts to "'amass and evaluate the vast amounts of data'" relevant to national policy. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (citation omitted).

As this Court explained in *Turner*, "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." 520 U.S. at 199. As a result, the federal courts "must give considerable deference, in examining the evidence, to Congress' findings and conclusions." *Id.* Congress is certainly entitled to rely on a fact-finding process that is as broad and flexible as that relied on by state legislatures, which can involve many different types of evidence, including anecdotal evidence. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-94 (2000) (finding that the evidence supporting Missouri's campaign finance reform law, which consisted mainly of a series of "newspaper accounts of large contributions support[ed] inferences of impropriety," did "not present a

close call" as to the sufficiency of the legislative record supporting reform); *cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627-28 (1995) (noting that "[t]he anecdotal record" supporting the regulation on attorney solicitations "[wa]s noteworthy for its breadth and detail," especially since the views expressed by these individuals corresponded with the general conclusions of the statistical studies that were performed). While Congress must support its legislation with something more than "a generalized assertion as to the classification's relevance to its goals," *see Croson*, 488 U.S. at 500-01, or "mere conjecture," *see Nixon*, 528 U.S. at 392, this Court has repeatedly explained that a "'strong basis in evidence' need not take any particular form." *See, e.g., Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring); *accord Abrams v. Johnson*, 521 U.S. 74, 110 (1997) (Breyer, J., dissenting).

Indeed, Petitioner's proposed test would leave Congress with much less latitude for the application of its sound common sense than the jury is permitted in any routine Title VII case. That cannot be, and is not, the law. As Justice Kennedy explained in *Croson*, "evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court." 488 U.S. at 519 (Kennedy, J., concurring); *see also Fullilove*, 448 U.S. at 457-68, 477-78 (Burger, C.J.) (summarizing and approving of evidence relied on by Congress, including direct testimony and anecdotal evidence); *see also id.* at 503-06 (Powell, J., concurring).

Petitioner's suggestion that Congress cannot assert a compelling interest in remedying a problem on a national scale unless it makes specific findings that that problem occurs in at least a majority of the States is similarly arbitrary and unsupportable. As previously explained, *see*

Section I.A *supra*, this Court has never required Congress to make state-by-state findings when it legislates nationally. *See also Fullilove*, 448 U.S. at 457-468, 477-78 (Burger, C.J.); *id.* at 504-06 (Powell, J., concurring); *accord Croson*, 488 U.S. at 488-492. Any rigid requirement that Congress make detailed state-by-state or city-by-city findings is simply incompatible with the legislative process. *See Fullilove*, 448 U.S. at 478 (Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings.").

D. Congress Had A Strong Basis in Evidence For Concluding That Construction Contracts Were Affected by Race And Gender Discrimination

Strict scrutiny requires only that there be a "'strong basis in evidence for [Congress'] conclusion that remedial action was necessary,'" *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)), in order to "smoke out" the possibility that an assertedly remedial statute was "'in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Adarand I*, 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493). Given the evidence of discrimination accumulated by Congress over the last twenty-five years—evidence described by the District Court as "vast," *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1576 (D. Colo. 1997) ("*Adarand II*"), and by the *Fullilove* Court as "abundant," 448 U.S. at 477-78 (Burger, C.J.)—it is now beyond the boundary of reasonable dispute that the requisite "strong basis in evidence" exists for Congress to authorize the flexible programs at issue here.

1. Congress Has Gathered Compelling Evidence Of Discrimination

Over the last thirty years, Congress has carefully studied the effects of discrimination against small businesses owned by minorities and women who are

attempting to participate in federal, state and local contracting. Based on this review, Congress has concluded that the problem of race and gender discrimination remains serious enough that it may be necessary, in appropriate circumstances, for implementing agencies to employ a narrowly tailored race-conscious remedy. Congress has also recognized that local or individual circumstances may not always justify such a remedy and has given the implementing officials the flexibility they need to suspend or modify their programs as appropriate. That evidence is far too voluminous to fully recount, or even summarize, here—just as it could not be fully catalogued in the Tenth Circuit's opinion or in the Appendix to the Department of Justice's 1996 report on Proposed Reforms to Affirmative Action in Federal Procurement, alternatively cited in this litigation as "Appendix A" or "The Compelling Interest." *See* 61 Fed. Reg. 26042, 26050-63 (May 23, 1996). We therefore limit our discussion to the following key points.

First, it is critical to recognize that this evidence must be viewed cumulatively as a whole rather than in isolation. Congress' consideration of the disputed statutory provisions and prior laws, for example, was not informed solely by the voluminous materials explicitly referenced in the legislative history of those laws, but also by Congress' experience with similar legislation over more than twenty years, beginning with the enactment of Section 103(f)(2) of the Public Works Employment Act of 1977 ("PWEA"), Pub. L. 95-28, 91 Stat. 116, 117.

Second, the breadth of the evidence considered in that cumulative legislative record is important not merely because of its sheer aggregate weight and persuasiveness, but also because the very diversity of that evidence should allay the concerns that this Court expressed in *Croson* about the permissibility of inferring discrimination from evidence of mere disparity. 488 U.S. at 502-06. Modern

social science has distinct limitations, and no statistical study ever manages to eliminate all variables but the one being studied. It is always possible, therefore, to point to a flaw or an alternative explanation for the results of an individual study or other piece of evidence that seems to indicate discrimination. But when many thousands of individual pieces of evidence, gathered over the course of decades from many different locations using widely diverse methods, suggest the same inference, Congress must be entitled to draw that reasonable inference. As this Court has already recognized in this very case, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." *Adarand I*, 515 U.S. at 237. With all due respect, it would be a drastic reversal of institutional roles for this Court to substitute its judgment for Congress' on this basic and crucially important factual question.

Third, this Court has already held in *Fullilove* that the evidence relied upon by Congress in enacting Section 103(f)(2) of the PWEA in 1977 was sufficient to establish a compelling interest in race-conscious relief. Chief Justice Burger's plurality opinion had no difficulty concluding that the legislative record before Congress contained "abundant evidence" supporting the conclusion that "minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-78 (Burger, C.J.). The relevant legislative record in this case contains the same evidence that this Court considered in *Fullilove*, as well as the accumulated products of an additional twenty years of careful study by Congress and various federal agencies.

2. Petitioner's Brief Misstates The Nature And Scope Of The Evidence Considered By Congress

Petitioner claims that the "strong basis in evidence" identified by Congress and the Tenth Circuit consisted solely of evidence indicating that minority-owned businesses face various race-neutral barriers common to all small entrants in the contracting business, such as "[t]he difficulty of obtaining access to capital in the absence of a credit history or collateral." *See* Pet.'s Br. at 27. In fact, the legislative record is replete with evidence, discussed in part by the Tenth Circuit, that minority and women-owned businesses face obstacles that differ in both kind and degree from those faced by white-owned contracting firms of similar size, experience, and capitalization.

As this Court has recognized, Congress first adopted the race-conscious measures considered in *Fullilove* only after several decades of experience with the race-neutral provisions of the Small Business Act and other federal programs showed that those race-neutral alternatives were wholly ineffective. *See, e.g., Croson*, 488 U.S. at 507 ("The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside."); *see also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1178 (10th Cir. 2000) ("*Adarand III*") (noting the district court's unchallenged finding in this case, now law of the case, that "Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy").

More recently, Congress was presented with dramatic evidence of the consequences for minority-owned contracting firms when existing DBE programs are

eliminated. As numerous Senators and Representatives pointed out in the floor debates over the reauthorization of the DBE program in the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 ("TEA-21"), the evidence shows that when a State eliminates or abandons its affirmative action programs, participation by women and minorities in State contracting drops precipitously, often falling to or near zero. *See* 144 Cong. Rec. S1401, S1404, S1409, S1420, S1426 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, Kerry, Mosely-Braun, and Domenici) (discussing the experience in, *inter alia*, Arkansas, Louisiana, Missouri, Michigan, Arizona, Delaware, Nebraska, Oregon, and Rhode Island). By contrast, given the existence of DOT's affirmative action program, minority- and women-owned businesses typically received between 10 and 15 percent of the subcontracts on federal projects in these States. *See id.* Although these firms were qualified and able to perform work on federal construction projects, they were "completely shut out" of state contracting opportunities. *Id.* at S1409 (statement of Sen. Kerry). Given this and the other evidence available to it, Congress could reasonably and permissibly conclude that these businesses were continuing to experience discrimination by others in the transportation-related construction industry.

While Petitioner may argue that these firms simply lost contracts because they did not submit the lowest bid, the legislative record compiled by Congress demonstrates that this failure is all too often the result of race and gender discrimination. In particular, Congress had extensive direct evidence of unmistakable and invidious discrimination against minorities, women, and the firms they owned by: (1) employers who discriminate against individuals on the basis of their race and gender; (2) prime contractors who engage in "bid shopping," so that white firms receive an additional chance to undercut the bid of a minority firm; (3) unions

which have sometimes kept minorities out of their organizations; (4) suppliers who often engage in discriminatory pricing by charging minority-owned firms prices which are far in excess of those paid by white businesses; and (5) lending and bonding institutions which typically refuse to provide the necessary financing to minority- and women-owned businesses or simply do so in far lower quantities at far higher rates. *See, e.g.*, 61 Fed. Reg. at 26054-62, H.R. Rep. No. 100-736, at 7-57.

As the Tenth Circuit put it, these patterns of discrimination "ha[ve] woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide." *See Adarand III*, 228 F.3d at 1168. For example, "[o]ver and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with *identical* collateral and borrowing credentials." 61 Fed. Reg. at 26057-58. Congress also possessed evidence that materials suppliers deliberately charge higher prices for the same goods to minority-owned firms. *See id.* at 26061. Obviously, these and the other factors noted by Congress demonstrate that racial discrimination continues to skew the distribution of governmental contract and subcontract awards at both the state and federal level.

Congress carefully considered all of this evidence when re-authorizing the DBE program in TEA-21 in 1998. *See, e.g.*, 144 Cong. Rec. S1422, S1430 (Mar. 5, 1998) (statements of Sens. Robb and Kennedy); *id.* at S5414 (May 22, 1998) (statement of Sen. Chafee); *see also* 144 Cong. Rec. H2006, H2010, H2011 (Apr. 1, 1998) (statements of Reps. Scott, Dixon, and Millender-McDonald). Those comments and others show beyond any doubt that the extensive evidence of overt discrimination in the construction industry presented to the courts below was in fact carefully

considered by Congress. Indeed, Representative Norton's discussion of that evidence during the House debate is particularly noteworthy. *Id.* at H3957-60 (May 22, 1998).

While Petitioner suggests that a recent "benchmark" study conducted by the Department of Commerce ("DOC") and an assessment of DOT's DBE program prepared by the General Accounting Office ("GAO") undermine Congress' "compelling interest" findings, this argument is meritless. First, even if the conclusions of these two studies were inconsistent with other evidence, they would not outweigh the overwhelming evidence that points in the other direction. Second, and more importantly, the conclusions of these studies are not inconsistent with Congress' findings.

The federal government uses the process of "benchmarking" to determine when race-conscious measures are needed in a particular region in order to address a disparity in federal contract awards in situations where it has been "demonstrat[ed] that minority business formation and operation in a specific industry has been suppressed by discrimination." *See* 61 Fed. Reg. at 26045-46. Benchmarking employs an economic and statistical analysis which is designed to measure gaps in contracting awards to small minority-owned prime contractors compared to their white counterparts, taking into account the size, age and other relevant characteristics of these businesses. *See* 63 Fed. Reg. 35714, 35716-18 (June 30, 1998). As a result, the federal government is better able to measure the lack of minority participation in government contracts which results from discrimination.

Moreover, the benchmarking study is limited to prime contractors, and it does not purport to measure the obstacles faced by new firms attempting to enter the market either as a prime contractor or a subcontractor. Nor does benchmarking attempt to measure the level of contracting that groups would achieve in the absence of affirmative

action programs. Consequently, it understates the disparities that would exist in the absence of such programs. *See* 63 Fed. Reg. at 35718 & n.10. The benchmarking study is also based on regional assessments and does not indicate how many States within each region show continuing effects of discrimination. Therefore, a finding that there are not identifiable effects of discrimination within a given region overall does not mean there are not such effects in certain States within that region.[3]

Presently, the DOC has concluded that no significant disparity exists in the awarding of federal construction contracts to prime contractors in seven out of nine regions in this country. *See* 64 Fed. Reg. 52806, 52808 (Sept. 30, 1999). As a result, the federal government has suspended its race-based affirmative action efforts in these areas. *See* 61 Fed. Reg. at 26046-47. The primary conclusion to be drawn from the benchmarking study is that the Executive Branch has developed a method to narrowly tailor the remedial scheme authorized by Congress by ensuring that race-based measures are used only where and when they are necessary.

The GAO report cited by Petitioner attempted to measure the progress of DOT's current DBE program. *See* GAO, Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information Is Needed To Understand Program Impact 3-4 (June 2001). This report primarily concluded that inconsistent data-gathering and record-keeping by State agencies made it impossible to

[3] Because the DOC's benchmarking study is based on regional assessments, it does not indicate how many States within each region show continuing effects of discrimination. Obviously, a finding that there are no effects of discrimination in federal contracting in a particular region does not mean there are no such effects in certain states within the region. In this respect, the study provides no support for Petitioner's claim that "Congress ha[s] affirmative reason to believe there is no nationwide discrimination against minority highway construction companies." *See* Pet.'s Br. at 33-34.

definitively answer questions concerning the program's success. *Id.* at 18-24. The report certainly did not conclude that DBEs do not face discrimination in the contracting industry. To the contrary, GAO noted that, where "sufficient data" was available about the effects of discontinuing a DBE program (in Minnesota and Louisiana), the results showed that DBE participation in contracting "dramatically declined" when an affirmative action program was cancelled, *id.* at 38-40, which only serves to reinforce the earlier findings made by Congress on this point. *See* Section I.B *supra*. In fact, the report's most skeptical assertion is that "limited data" and "methodological weaknesses" which are "inherent in conducting disparity studies" and "common to social science research" created "uncertainties" about the findings of discrimination in fourteen recent disparity studies. *See* GAO Rept. at 29. That is hardly a repudiation of Congress' extensive findings.

II. THE STATUTES AT ISSUE IN THIS CASE ARE NARROWLY TAILORED TO FURTHER THE COMPELLING INTEREST IDENTIFIED BY CONGRESS

A. Congress Can Leave Details Of Implementation To Executive Branch Agencies

Any race-conscious measures must be narrowly tailored to further Congress' compelling interest in remedying, and avoiding passive participation in, identified discrimination. *See Adarand I*, 515 U.S. at 237. When Congress authorizes the Executive Branch to implement a national program that includes race-conscious and gender-conscious remedies, "narrow tailoring" at the statutory level requires only that the statute's requirements not be facially unconstitutional, and that they permit agencies the flexibility needed to employ these remedies under appropriate circumstances.

As this Court recognized in both *Fullilove* and *Croson*, if Congress provides the implementing agencies sufficient

flexibility to narrowly tailor a race-conscious remedy, it need not specify on the face of the statute precisely how such a remedy would be employed under all circumstances. Chief Justice Burger emphasized this point in *Fullilove*, noting that "[a]dministrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program...to... eliminate from participation in the program [D]BE's who are not 'bona fide' within the regulations and guidelines," and that the program permitted administrative waivers if its percentage goals could not be achieved in a particular instance "within the limitations of the program's remedial objectives." 448 U.S. at 487-88 (Burger, CJ.); *see also id.* at 468 ("Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.").

B. The Statutory Goals Are Narrowly Tailored

The aspirational goals for minority participation in federal contracting included in the Small Business Act and TEA-21 are narrowly tailored to achieve the compelling interest identified by Congress. They were enacted at a level of generality appropriate to national legislation, and they permit Executive Branch officials charged with implementing those goals adequate flexibility to narrowly tailor the program's implementation to local or even individual conditions. Although there are minor variations in language, the statutory goals for DBE participation in federal contracting share one important characteristic: all of them are aspirational and expressly subject to administrative waiver or revision, on both a national and local level, in the event that implementing agencies and officials determine that they exceed the program's remedial justification.

The statutes all provide that the relevant targets are "goals" and that they apply "[e]xcept to the extent the Secretary determines otherwise." *See, e.g.*, TEA-21, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998); Intermodal Surface Transportation Efficiency Act of 1991, Pub L. No. 102-240, Tit. I, § 1003(b), 105 Stat. 1914, 1919-1920 ("ISTEA") (same). Because of this flexibility, these goals have nothing in common with the "rigid [30%] racial quota" invalidated by this Court in *Croson*. 488 U.S. at 499; *id.* at 504 ("By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area."); *Fullilove*, 448 U.S. at 514 (Powell, J., concurring) ("Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision....").

The new DOT regulations implementing its DBE program demonstrate full well that the challenged statutes leave sufficient flexibility for constitutional application. Those regulations expressly recognize that the 10 percent statutory goal in TEA-21 is "an aspirational goal at the national level" which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level." 49 C.F.R. § 26.41 (2000). Instead, recipients must set goals for DBE contract participation on the basis of "demonstrable evidence of the availability of ready, willing and able" DBEs in the recipient's local market. 49 C.F.R. § 26.45 (2000). That goal must be based on all available evidence concerning that market, and its justification must be carefully documented in a plan submitted to DOT. *Id.* Thus, a state must effectively undertake its own benchmarking analysis in order to determine whether race-conscious measures are

necessary and, if so, to what degree. Therefore, like the federal government's benchmarking approach, the use of these race-conscious remedies can be narrowly tailored to fit the precise needs of the jurisdiction in question.

Moreover, once a goal is set, the recipient must then use race-neutral means to "meet the maximum feasible portion" of that goal. 49 C.F.R. § 26.51(b) (2000) (detailing the various race-neutral means available). The regulations explicitly prohibit the use of quotas, and permit set-asides only in "limited and extreme circumstances...when no other method could reasonably be expected to redress egregious instances of discrimination." 49 C.F.R. § 26.43 (2000). The recipient also need not actually meet its goals, but must merely make a good faith effort to do so. 49 C.F.R. § 26.47 (2000). Waivers and exemptions are also available under appropriate circumstances. 49 C.F.R. § 26.15 (2000).

Congress was well aware of DOT's efforts to narrowly tailor these programs, and considered that capacity to be an essential feature of the statutory scheme when it reauthorized the DBE program in TEA-21. *See, e.g.*, 144 Cong. Rec. S1401, S1402, S1408, S1423, S1425, S1428, S1430, S1433 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, Kerry, Domenici, Kennedy, and Boxer); *see also* 144 Cong. Rec. H2001, H2003, H2004, H2008-11 (Apr. 1, 1998) (statements of Reps. Tauscher, Poshard, Bonoir, Meek, Towns, and Millender-McDonald).

C. The Race and Gender-Conscious Presumptions Are Narrowly Tailored

The race- and gender-conscious presumptions of disadvantage included in these statutes are also narrowly tailored to advance Congress' compelling interest in ensuring that federal funds do not serve to finance and perpetuate the evils of race and gender discrimination in the transportation-related contracting industry.

1. Congress Reasonably Concluded That A Presumption Is Necessary

The inclusion of race- or gender-conscious presumptions at the statutory level represents Congress' reasonable conclusion that these programs may, in some circumstances, need to be race- and gender-conscious in order to be effective. Congress decided to authorize flexible race- and gender-conscious remedies only after purely race- and gender-neutral measures had proven wholly ineffectual at remedying the identified discriminatory conditions in the contracting industry. As Justice Powell acknowledged in *Fullilove*, at the time Congress enacted the initial version of this legislation, "it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by anti[-]discrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts." 448 U.S. at 510 (Powell, J., concurring).

A majority of this Court in *Croson* cited that factual finding from *Fullilove* with approval. 488 U.S. at 504. The District Court in this case made a similar factual finding. "Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy." *See Adarand III*, 228 F.3d at 1178.

Contrary to Petitioner's assertion, this Court did not hold in *Croson* that a race-conscious remedy can only be narrowly tailored if its beneficiaries are expressly limited to identified, individual victims of past discrimination. Instead, Justice Scalia articulated this position in his concurrence;

but, as he pointed out, such an "individualized" program would not actually be race-conscious at all. 488 U.S. at 526 (Scalia, J., concurring) (noting that "according a contracting preference to identified victims of discrimination" would in fact be "race-neutral remediation"). This Court has never held that individualized Title VII lawsuits or administrative grievance procedures are the only permissible means of remedying identified discrimination; indeed, that is not even the law under Title VII itself. *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986) (voluntary action by employers under Title VII "may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination").

It is difficult to understand how any remedial program designed to achieve the objectives Congress had in mind could be effective without the use of some type of a presumption that certain groups have been disadvantaged by discrimination based on the racial or gender characteristics of that group. After considering substantial evidence regarding the construction industry, Congress concluded that the severity and pervasiveness of discrimination has had its most severe effect on minorities and women and, therefore, that they can presumed to be "socially disadvantaged" for purposes of determining eligibility. *See* Section I.B *supra*. At the same time, Congress authorized DOT to make this presumption rebuttable in order to preclude those who have been financially successful from obtaining benefits they do not need. *See* Section II.C.2 *infra*. In this respect, the use of the presumption resembles the burden-shifting framework under Title VII, which enables an individual to raise an inference of discrimination upon a showing of certain facts but allows this inference to be overcome upon a showing of other evidence. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508-11 (1993). Finally, Congress authorized

DOT to allow others who had experienced other forms of discrimination to qualify under certain circumstances.

This carefully crafted scheme achieves the goal of remedying the most pernicious forms of discrimination against those who have been most severely affected, while allowing others who experience other forms of discrimination to qualify under some circumstances. Precluding the use of all types of presumptions based on race or gender would prevent Congress from addressing the reality that women and minorities have experienced pervasive and severe discrimination by making it overly difficult for members of these groups to establish these effects. Strict scrutiny would, thus, become "fatal in fact," contrary to this Court's prior statements. *See, e.g., Fullilove*, 448 U.S. at 519.

2. The Presumption Can Be Applied In A Constitutional Way

Like the aspirational goals discussed above, the presumptions of disadvantage included in the statutes potentially at issue in this case are flexible enough to be applied in a constitutional way. As implemented under the current DOT regulations, the presumption of social and economic disadvantage plays an essentially procedural role. Applicants for DBE status who are members of the specified minority groups must still certify, under penalty of perjury, that they are in fact socially and economically disadvantaged within the meaning of the statute, and that status may be challenged by any person, including the contractor, the certifying authority, and DOT itself. 49 C.F.R. §§ 26.67, 26.83, 26.87 (2000). The Small Disadvantaged Business ("SDB") program, which applies to contracting opportunities with the federal government, imposes similar requirements. 13 C.F.R. §§ 124.1002, 124.1008, 124.1016-17 (2000); 48 C.F.R. § 19.703 (2000). Moreover, and more importantly, applicants to both

programs must now demonstrate that they are economically disadvantaged by submitting documentation concerning their personal net worth, and this presumption is automatically rebutted for any individual whose net worth exceeds $750,000. 49 C.F.R. § 26.67(b)(1) (2000); 13 C.F.R. §§ 124.1002(c), 124.1008(e). Furthermore, applicants who are not entitled to the presumption may nonetheless establish, by a mere preponderance of the evidence, that they are in fact socially and economically disadvantaged. 49 C.F.R. § 26.61(d) (2000); 13 C.F.R. § 124.1008(e)(2). As implemented, therefore, the presumption simply reflects a factual judgment by Congress and the SBA that members of the enumerated groups are more likely to be socially and economically disadvantaged than not.

Petitioner's argument that those implementing regulations are inconsistent with the statutes, *see* Pet.'s Br. at 41-43, is meritless. As this Court recognized in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," and the agency's administrative interpretations are entitled to deference. 467 U.S. at 844. This is especially true when, as is the case with DOT, the agency has substantial experience in the area in question. *Id.* at 844-45 ("'If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'") (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Thus, as this Court recently explained, in the case of a broad statutory authorization, an agency's "regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001); *see also Chevron*,

467 U.S. at 844 (noting that the agency's interpretation should be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute"). There is no showing that these regulations are flawed in any of these ways.

The plain meaning of the term "presumption" allows for rebuttable presumptions, as even the authority which Petitioner cites makes clear. *See, e.g.*, 1 *Weinsten's Federal Evidence* § 301.02[1] (2d ed. 2000) (explaining that a "fact-finder must accept that the presumed fact...has...been established, *unless the presumption is rebutted*") (emphasis added). Moreover, the statutory framework explicitly provides that "[t]he Secretary [of Transportation] shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection," *see* TEA-21, Pub. L. 105-178 § 1101(b)(4), 112 Stat. at 114, which amounts to a delegation of congressional authority to "make rules carrying the force of law." *See Mead*, 121 S. Ct. at 2171 (also noting that "[d]elegation of such authority may be shown...by an agency's power to engage in adjudication or notice-and-comment rulemaking"); *cf.* 64 Fed. Reg. 5096 (Feb. 2, 1999). Furthermore, since its inception, the legislation has been accompanied by regulations which require an inquiry into whether an applicant meets the requirements of the program, and Congress has always been aware of these regulatory provisions. *Cf. Fullilove*, 448 U.S. at 487-88 (observing that "[t]here is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not 'bona fide' within the regulations and guidelines; for example, spurious minority-front entities can be exposed"). Indeed, at the time that Congress enacted TEA-21, it explained that the presumption of disadvantage was rebuttable and that the regulations required an individualized inquiry into whether a particular applicant truly qualified for inclusion in the program. *See, e.g.*, 144

Cong. Rec. S1402 (Mar. 5, 1998) (statement of Sen. Baucus) ("There is the presumption that...members of certain minority groups are in fact disadvantaged. It is only a presumption, a presumption that can be overcome...."). Thus, all of the *Chevron* and *Mead* requirements are met.

CONCLUSION

Our focus in this brief has been the statutory framework underlying DOT's programs. Consequently, we respectfully urge this Court to hold the Acts of Congress potentially implicated in this litigation are facially constitutional. As noted earlier, some amici have had the opportunity to review DOT's regulations and have concluded that they meet constitutional requirements as well.

Respectfully submitted

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APPENDIX

APPENDIX

LISTING OF CONGRESSIONAL AMICI

Senator Max Baucus (Montana)
Senator Tom Daschle (South Dakota)
Senator Hillary Rodham Clinton (New York)
Senator Russell D. Feingold (Wisconsin)
Senator Edward M. Kennedy (Massachusetts)
Senator John F. Kerry (Massachusetts)
Senator Mary L. Landrieu (Louisiana)
Senator Patrick J. Leahy (Vermont)
Representative Richard A. Gephardt (Missouri)

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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA,
SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BREIF OF *AMICI CURIAE* NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ASIAN PACIFIC AMERICAN LEGAL CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, *ET AL.* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. INTRODUCTION 6

II. CONGRESS ENACTED THE DBE PROGRAM IN THE CONTEXT OF A CONTINUING HISTORY OF WIDESPREAD DISCRIMINATION AGAINST ASIAN-PACIFIC AMERICANS 9

A. Asian-Pacific Americans Historically Have Suffered Extensive Racial Discrimination 9

B. Discrimination Against Asian-Pacific Americans Continues To This Day 13

III. THE DBE PROGRAM ADDRESSES THE SUBSTANTIAL EVIDENCE OF DISCRIMINATION AGAINST ASIAN-PACIFIC AMERICANS IN GOVERNMENT CONTRACTING 16

A. Congress Made Extensive Findings That Asian-Pacific Americans Suffer Direct Discrimination In Government Contracting 17

B. Racial Discrimination Also Indirectly Disadvantages Asian-Pacific Americans In Government Contracting 21

1. Discrimination In Financing And Lending 22

2. Discrimination In The Development Of Human Capital 23
3. Discrimination By Labor Unions 25
4. Discrimination In Bonding 26
5. Discrimination By Prime Contractors and Suppliers 28

IV. CONCLUSION 28

TABLE OF AUTHORITIES

PAGE(S)

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Asian Pacific American Legal Consortium ("NAPALC") is a national, nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian-Pacific Americans. NAPALC is committed to supporting affirmative action as a way of ensuring equal opportunities for women and minorities. NAPALC focuses on educating policymakers, corporations, institutions, and the general public on the facts and importance of affirmative action to the Asian-Pacific community, and works with other civil rights organizations and policymakers to ensure that affirmative action programs are appropriate and effective and that they address Asian-Pacific American concerns.

The Asian Law Caucus ("ALC") is á nonprofit, public-interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian-Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian-Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on affirmative action and discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on affirmative action.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a nonprofit civil rights organization based in New York City. AALDEF protects and promotes the civil rights of Asian Americans through

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[1] Pursuant to Supreme Court Rule 37.3(a), *Amici* have obtained consent from Petitioner and Respondents to file this brief. Pursuant to Supreme Court Rule 37.6, *Amici* note that the position they take in this brief has not been approved or financed by Respondents or their counsel. No counsel for Petitioner or Respondents had any role in authoring this brief. The written consents of Petitioner and Respondents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

litigation, legal advocacy, and community education. AALDEF has challenged discrimination on the basis of race, national origin, and immigration status in both the public and private sectors, and works to secure for Asian Americans opportunities denied to them as a result of their historic exclusion from the mainstream of American life and of their legacy of discrimination sanctioned by law.

The Asian Pacific American Legal Center ("APALC") is the leading organization in Southern California dedicated to providing the growing Asian-Pacific American community with multilingual, culturally sensitive legal services, education, and civil rights advocacy.

The Asian Law Alliance ("ALA"), founded in 1977, is a nonprofit, public-interest legal organization with the mission of providing equal access to the justice system for the Asian and Pacific Islander communities in Santa Clara County, California. ALA has provided community education and legal services on affirmative action and discrimination issues.

The Organization of Chinese Americans, Inc. ("OCA") is a nonprofit nonpartisan civil rights organization dedicated to ensuring the equality of Chinese Americans, Asian Americans and all Americans in the United States. Founded in 1973, OCA currently represents over 10,000 members in 41 chapters and 26 college affiliates. OCA has worked to ensure that Asian-Pacific Americans have had equal opportunities and access to education and the business world, as well as career opportunities.

The National Asian Pacific American Bar Association ("NAPABA") is the national professional association of Asian-Pacific American attorneys, judges, law professors, and law students. NAPABA was incorporated in 1989 to represent and advocate for, on a national level, the interests of Asian-Pacific American attorneys and their communities.

To advance its goals, NAPABA monitors legislative developments and judicial appointments, and advocates on issues of importance to Asian-Pacific American lawyers and their communities.

The National Federation of Filipino American Associations ("NaFFAA") is a private, nonprofit, nonpartisan, tax-exempt organization established in 1997 to promote the welfare and well-being of all Filipinos and Filipino-Americans throughout the United States. NaFFAA joins this *amici curiae* brief to inform this Court about the benefits for Asian Americans resulting from equal opportunity programs and policies in public contracting.

The Japanese American Citizens League ("JACL"), founded in 1929, is one of the oldest and largest Asian-American nonprofit, nonpartisan organizations committed to securing and upholding the human and civil rights of Americans of Japanese ancestry and others. During World War II, Japanese Americans were denied constitutional rights and were incarcerated by the United States for no reason other than their ethnicity. Through JACL and other groups, those who were wrongfully forced into internment camps obtained redress, but discrimination against Japanese Americans remains an issue. Knowing the harm caused by discrimination and the importance of programs that counter the effects of discrimination, JACL has worked hard to educate people on the need for affirmative action programs.

The Southwest Center for Asian Pacific American Law ("SCAPAL") is a nonprofit public-benefit corporation formed by concerned professionals from San Diego's legal, business, and academic communities for the purpose of preserving and protecting the legal rights of individuals in the San Diego region who do not have adequate access to the legal system.

This case addresses federal efforts to remedy past and present discriminatory practices within federal government contracting that have led to the underutilization of minority-owned business enterprises ("MBEs") and women-owned business enterprises ("WBEs"). Specifically, this case addresses the appropriate role that the United States Department of Transportation's Disadvantaged Business Enterprise program (the "DBE Program" or "Program") plays in remedying past discrimination by raising the utilization of qualified MBEs and WBEs to levels that reflect justice and fair play – issues that long have been of vital concern to all *amici curiae* (collectively, "*Amici*"). The decision of this Court will affect not only the program at issue but also similar public contracting programs administered by local and state governments. Accordingly, because of the broad impact of the decision here, *Amici* have an important and substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

Petitioner challenges the Court of Appeals' decision that the DBE Program is narrowly tailored to further Congress' compelling interest in eradicating racial discrimination and its effects in federal highway transportation contracting. In creating the DBE Program, Congress made extensive findings that racial discrimination against minority-owned businesses, including those owned by Asian-Pacific Americans, is a pervasive problem that compels a nationwide, federal solution. Congress fashioned such a solution by creating a rebuttable presumption that individual members of certain historically discriminated-against groups, including Asian-Pacific Americans, suffer social and economic disadvantages that justify limited remedial measures that allow them to compete fairly for government contracts. This brief details the continuing racial

discrimination against Asian-Pacific Americans that justifies this rebuttable presumption.

As this brief demonstrates, Congress' findings that Asian-Pacific Americans suffer discrimination in government contracting must be placed in a broader historical context of discrimination. Asian-Pacific Americans have experienced racial discrimination in virtually all areas of public and private life. Since this nation's earliest days, racially discriminatory federal, state, and private actions have denied Asian-Pacific Americans basic rights in areas as diverse as immigration and citizenship, land ownership and education, business, and, ultimately, government contracting.

Congress' findings, which are well supported by numerous other sources, demonstrate the existence of direct discrimination against Asian-Pacific-American-owned businesses in the awarding of federal government contracts. In addition to direct discrimination, other, more insidious means of racial discrimination also prevent Asian-Pacific Americans from competing for federal government contracts. By limiting available opportunities for funding, training, and experience, racial discrimination blocks Asian-Pacific Americans from establishing contracting businesses in the first instance. Then, by excluding Asian-Pacific Americans from the "old boy" networks critical to contracting decisions, racial discrimination prevents even those Asian-Pacific Americans who are able to start businesses from competing on a fair basis for many government contracts. Racial discrimination further blocks fair competition because it often results in, among other things, higher price quotations from suppliers, bid-rigging, and blocked access to bonding and financing from commercial lenders.

The continuing history of discrimination more than justifies the DBE Program's rebuttable presumption that Asian-Pacific Americans are disadvantaged as a result of

racial discrimination in competing for federal contracts. Accordingly, this Court should uphold the Court of Appeals' conclusion that the DBE Program satisfies strict scrutiny.

ARGUMENT

I. INTRODUCTION

It is well established that a federal program may constitutionally apply race-conscious remedies so long as it is narrowly tailored to serve a compelling governmental interest. *See, e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 235-36 (1995) ("*Adarand I*"); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989). The scrutiny given to such a program, although strict, is not fatal. *See Adarand I*, 515 U.S. at 237. Here, the Court of Appeals, applying strict scrutiny, correctly agreed with the government's argument that the DBE Program was an appropriate means of "remedying the effect of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1164 (10th Cir. 2000) (internal citation omitted) ("*Adarand II*"). The Court of Appeals correctly found that the DBE Program was narrowly tailored to further the government's compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies." *Id.* at 1176. The Court of Appeals based this conclusion on a detailed review of Congress' substantial findings regarding discrimination against minorities in public contracting.

Petitioner challenges the Court of Appeals' decision, asserting, among other things, that the government failed to demonstrate that the Program serves a compelling interest. Petitioner urges this Court to adopt the view that the strict scrutiny requirements never can be satisfied by a racial classification in government contracting, *see* Petitioner's

Brief on the Merits ("Pet. Brief") at 21-22, a view that this Court already rejected in *Adarand I*. *See Ararand I*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'") (citation omitted); *see also Croson*, 488 U.S. at 493-94 (remedying past discrimination is a compelling governmental interest); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 301-02 & n.41 (1978) (discussing government authority to take remedial measures to alleviate past discrimination). Petitioner also takes issue with the evidence that racial discrimination causes racial disparities in the contracting industry and asserts that Congress made inadequate findings even with respect to the fact of discrimination. *See* Pet. Brief at 28 (speculating that Congress' motivation was "racial politics," not remedying discrimination).

Contrary to Petitioner's assertions, and as the Court of Appeals recognized, Congress found an extensive history of discrimination that disadvantages minority-owned businesses, and Asian-Pacific-American-owned businesses in particular, in the context of government contracting. *See infra* § III.[2] In the DBE Program, Congress sought to remedy this history of discrimination by creating a rebuttable presumption that individual members of certain historically discriminated-against groups, including Asian-Pacific Americans, have suffered social and economic disadvantages that justify limited remedial measures that allow minorities

[2] *See also* 144 Cong. Rec. H3945-02, H3957 (1998) (statement of Rep. Norton) (debate over Conference Report on H.R. 2400, Transportation Equity Act for the 21st Century) (referencing twenty-nine Congressional hearings on discrimination in public contracting between 1980 and 1995 to support the proposition that "there is a raft of evidence of discrimination in the transportation construction industry.")

to compete fairly for government contracts.[3] Congress' findings more than justify this rebuttable presumption.

This brief describes the widespread discrimination against Asian-Pacific Americans that justifies the DBE Program's rebuttable presumption that Asian-Pacific-American-owned businesses are disadvantaged in government contracting. First, this brief discusses the history of pervasive discrimination against Asian-Pacific Americans that served as the context for Congress' establishment of the DBE Program. Next, this brief discusses the extensive evidence (in both the congressional findings and in academic and statistical studies) of discrimination against Asian-Pacific Americans in public contracting. The brief demonstrates not only that Asian-Pacific Americans are underutilized in public contracting, but also that discrimination in numerous areas related to contracting prevents them from competing on an equal basis for public contracts.

[3] Because the DBE Program employs a rebuttable presumption, the Program does not go as far as other programs that the Court has considered, such as the set-aside program in *Croson* or the quota program in *Bakke*. To the contrary, if individual members of traditionally disadvantaged groups have overcome the effects of present and past discrimination so that they no longer are disadvantaged, the presumption may be rebutted. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b), 112. Stat. 107, 113 (1998); 49 C.F.R. § 26.67 (2001) (discussing rebuttable presumption criteria). Indeed, as the DBE Program achieves its goals, the presumption will be rebutted more and more frequently. Additionally, Congress provided for companies owned by members of groups other than specified racial or ethnic minorities to qualify as DBEs where those individuals can show that they have suffered qualifying disadvantage. *See id.* Indeed, Petitioner itself has applied for and been granted DBE status under Colorado's DBE program. *See Adarand II*, 228 F.3d at 1157.

II. CONGRESS ENACTED THE DBE PROGRAM IN THE CONTEXT OF A CONTINUING HISTORY OF WIDESPREAD DISCRIMINATION AGAINST ASIAN-PACIFIC AMERICANS

The discrimination in government contracting addressed in the DBE Program must be understood in the context of a widespread history of racial discrimination that has affected Asian-Pacific Americans in virtually every aspect of life – from citizenship to immigration; from fundamental personal rights to business and professional life; and, ultimately, in government contracting. Unfortunately, discrimination against Asian-Pacific Americans is not merely a problem of the past; it continues to this day. Thus, Congress' attempt to remedy discrimination in the government contracting context represents an effort to begin to break the cycle of discrimination and disadvantage.

A. Asian-Pacific Americans Historically Have Suffered Extensive Racial Discrimination

From the very beginnings of American history, Asian-Pacific Americans have faced governmental discrimination that has prejudiced their ability to exercise the most basic rights. In 1790, among the first acts of the new federal Congress was to bar Asian-Pacific Americans and other minorities from becoming naturalized citizens. *See, e.g.*, Naturalization Act of March 26, 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795).[4] Starting in the mid-1800's,

[4] This prohibition lasted until 1952 for people of Japanese and Korean ancestry. *See* Immigration & Nationality Act, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952); *see also* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 17 & n.59 (1994) (discussing repealing of discriminatory immigration statutes). The courts, too, permitted exclusionary discrimination against Asian-Pacific Americans in citizenship. *See, e.g.*, *United States* v. *Thind*,

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immigration laws severely restricted the ability of Asian-Pacific Americans to enter the United States.[5] Indeed, between 1917 and 1965, the United States enacted no fewer than five statutes intended to eliminate or limit Asian and Pacific Islander immigration.[6] Indeed, it was not until 1965 that discriminatory quotas were halted against Asian Pacific immigration.[7] Discrimination against Asian immigration

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261 U.S. 204, 214 (1923) (upholding congressional intent to "exclude Asiatics generally from citizenship"); *Ozawa* v. *United States*, 260 U.S. 178 (1922) (holding Japanese immigrant continuously residing for twenty years in the U.S. to be ineligible for citizenship).

[5] *See, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (generally suspending entry of Chinese laborers to the United States for a period of ten years); Angelo N. Ancheta, *Race, Rights and the Asian American Experience* 25 (1998) (*"Race, Rights"*) ("The Page Law of 1875 [ch. 141, 18 Stat. 477 (1875)] was directed at preventing the entry of prostitutes, but immigration officials limited the entry of all Chinese women by classifying them as prostitutes").

[6] *See, e.g.*, U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States* vol. 2 at 339 (1939) (collected correspondence comprising the so-called "Gentleman's Agreement," which limited Japanese immigration); Act of February 5, 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874 (1917) (repealed 1952) (banning immigration from almost all countries in the Asia-Pacific region); Act of May 19, 1921, Pub. L. No. 67-5, ch. 8, 42 Stat. 5 (1921) (repealed 1952) (limiting immigration based on nationality); Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153 (1924) (limiting Asian immigration) (repealed 1952); Tydings-McDuffie Act of 1934, Pub. L. No. 73-127, ch. 84, 48 Stat. 456 (1934) (repealed 1952) (imposing annual quota of fifty Filipino immigrants).

[7] *See, e.g.*, William Pham, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 U.C.L.A. L. Rev. 1461, 1471 (1998) ("Pham") (explaining how "Congress enacted the Immigration and Nationality Act of 1965 and replaced the archaic national origins quotas system with a more neutral preference system based primarily on U.S. family ties and employment needs"); Katherine Tonnas, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. Rev. 295 (1993)

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continued through the 1980s and 1990s in the often uneven reactions to the recent waves of Vietnamese and Chinese political refugees.[8] The relatively few Asians and Pacific Islanders who overcame the discriminatory immigration laws faced high barriers to the exercise of the rights that this country holds out as the promise of its founding, including (among others) the rights to own land,[9] to marry,[10] and to obtain an education.[11] Perhaps the most egregious example of the effects of discrimination against Asian-Pacific Americans, though, was the brutal internment of approximately 120,000 Japanese Americans during World

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(... Continued)
("Tonnas") (Chinese immigration faced "an age of exclusion from 1882-1965").

[8] *See, e.g.*, Pham, 45 U.C.L.A. L. Rev. at 1474-80 (discussing history of discrimination in visa and refugee applications of Vietnamese immigrants); Tonnas, 20 S.U. L. Rev. at 323-29, 338-43 (discussing both Vietnamese and Chinese immigration).

[9] *See* discussion *infra*, pp. 12-13.

[10] *See, e.g.*, Ancheta, *Race, Rights*, at 30 (noting that laws prohibiting intermarriage with Asians were "common in Western states, and many laws remained on the books until the United States Supreme Court ruled them to be unconstitutional in [*Loving* v. *Virginia*, 388 U.S. 1 (1967)]").

[11] Like other racial minorities, Asian-Pacific American children were required to attend segregated schools. *See, e.g.*, Ronald Takaki, *A History of Asian Americans: Strangers From A Different Shore* 201 (1998) (stating that "the San Francisco Board of Education directed principals to send all Chinese, Japanese and Korean children to the Oriental School") (internal quotations omitted); *see also Lum* v. *Rice*, 275 U.S. 78, 86-87 (1927) (applying separate-but-equal doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), to Chinese citizens). Asian-Pacific Americans have continued to face hardships resulting from discriminatory rules regarding language usage. *See, e.g.*, U.S. English, Inc. official website, *available at* http://www.us-english.org/inc/ (visited July 3, 2001) (noting that 26 states currently have English-only statutes on their books).

War II. *See Korematsu* v. *United States*, 323 U.S. 214 (1944).[12]

Asian-Pacific Americans also have suffered discrimination in business. For example, between 1873 and 1884, San Francisco enacted fourteen ordinances with a discriminatory intent to restrict the economic growth and advancement of Chinese laundries. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886) (striking down ordinances as a violation of equal protection because of the discriminatory manner in which they were enforced); *see also* Sucheng Chan, *Asians: An Interpretive History* 94 (1991) ("*Interpretive History*") (documenting "[t]he harassment Chinese importers [and laundrymen] experienced") .

Further, until as recently as the late 1940s, several states prohibited Asian-Pacific Americans, including American-born citizens of Asian descent, from owning land. *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (detailing the history of preclusion of Japanese Americans from land-ownership in eleven states). Under so-called "Alien Land Laws," peoples of Asian descent could not buy agricultural land or lease it for long periods, preventing them from establishing agricultural businesses. *See, e.g.*, Ancheta, *Race, Rights* at 29 (discussing how California's Alien Land Law of 1913 prevented Japanese from establishing agricultural businesses by "prohibiting [Japanese] persons ineligible for citizenship from purchasing land in the state and by limiting lease terms to three years or less"). In 1920, "California's voters supported an initiative . . . that ended the ability of Asian aliens to lease farm land altogether." Chan, *Interpretive History*, at 47. That same initiative also prohibited them from purchasing land through corporations or in the names of their American-born children. *See id.* Following California's example, numerous other states enacted similar laws. *See id.; see also* Ancheta, *Race, Rights*, at 29-30; Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998). This Court upheld these discriminatory laws. *See, e.g., Porterfield* v. *Webb*, 263 U.S. 225 (1923) (upholding the Alien Land Act of California); *Terrace* v. *Thompson*, 263 U.S. 197 (1923) (affirming similar Washington state discriminatory land law). The last of these discriminatory land laws were not repealed or struck down until the early 1950's. *See, e.g., Fujii* v. *California*, 242 P.2d 617 (Cal. 1952) (striking down California's Alien Land Law); *Namba* v. *McCourt*, 204 P.2d 569 (Or. 1949) (striking down Oregon's Alien Land Law).

[12] Ironically, to support its position, Petitioner erroneously suggests that *Korematsu* stands for the proposition that this Court allows racial classifications only in the face of threats to national security such as espionage and sabotage, *see* Pet. Brief at 19, a proposition that directly contradicts *Adarand I*. *See Adarand I*, 515 U.S. at 236 (recognizing that the internment of Japanese Americans upheld in *Korematsu* was "illegitimate," and citing Congressional finding that "these actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership" (alterations in original; citation omitted).

B. Discrimination Against Asian-Pacific Americans Continues To This Day

Discrimination against Asian-Pacific Americans continues to this day. As recently as 1994, the United States Commission on Civil Rights found that being of "Asian descent" had a "negative effect" on an employee's chance to move upward into management. Deborah Woo, *The Glass Ceiling and Asian Americans: A Research Monograph* 42 (July, 1994) (unpublished manuscript) (citing to the U.S. Comm'n on Civil Rights, *Economic Status of Americans of Asian Descent: An Exploratory Investigation* (1988)) ("*Glass Ceiling and Asian Americans*") (copy lodged with

the Clerk of the Court). Indeed, one recent study stated that Asian-Pacific Americans "face the worst chance [among all racial groups] of being advanced into management positions." LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian American Studies Ctr., *The State of Asian Pacific America* 215-216 (1993). Asian-Pacific Americans have the lowest representation in the senior ranks in the federal government. *See* U.S. General Acc'g Office, *Senior Executive Service: Diversity Increased in the Past Decade* 109 (March 2001) (copy lodged with the Clerk of the Court) (finding that, in 2000, only 1.64 % of career senior executives in the federal government were Asian-Pacific Americans). Also, a study of senior executives of Fortune 500 industrial corporations and Fortune 500 service firms conducted in 1989 found that only 0.3% of survey respondents reported having "Oriental" ethnic origin. Korn/Ferry Int'l, *Executive Profile: A Decade of Change in Corporate Leadership* 23 (1990) (copy lodged with the Clerk of the Court). Asian-Pacific Americans also experience a lower return on their education than other groups. *See Woo, Glass Ceiling and Asian Americans*, at 44 (discussing Asian-Pacific Americans' "inability to find job opportunities commensurate with [their] education and training").

Moreover, as business owners today, Asian-Pacific Americans experience great disparities in their revenues compared to white-owned businesses. In 1987, Asian-Pacific Americans owned 2.6 % of all U.S. businesses, but revenues from Asian-Pacific-American-owned businesses accounted for only 1.7 % of total revenues from all businesses. *See* NAPALC, *Asian Pacific Americans and Public Contracting*, 4 (1997) ("Public Contracting") (copy

lodged with the Clerk of the Court).[13] Indeed, 1987 annual receipts for Asian-Pacific-American-owned businesses averaged $107,000, well below the $189,000 average for businesses owed by white men. *See id.* at 4-5 (citation omitted). In fact, over one-third of Asian-Pacific-American-owned businesses had receipts of less than $10,000. *See id.* at 6 (citation omitted).

Perhaps most ominous, though, is a recent study that shows that many Americans continue to harbor deeply racist views against Asian-Pacific Americans. This study found that approximately 25% of the American public hold decisively negative views of Chinese Americans, and that 32% believe that Chinese Americans are more loyal to China than to the U.S. *See* Committee of 100, *American Attitudes Toward Chinese Americans and Asian Americans* 12, 15 (Apr. 25, 2001), *available at* http://www.committee100.org/amer-att/amer-att.pdf. Indeed, the survey showed that 46% of those surveyed believe that "Chinese Americans passing on information to the Chinese government is a problem," *id.* at 25, and 23% said that they would be "uncomfortable" if an Asian American were elected president, in contrast to 15% who would be uncomfortable with an African-American President. *Id.* at 29. Almost 25% of those polled believe Chinese Americans are "taking away too many jobs from Americans," are "[o]verly aggressive in the workplace," and "have too much power in the business world." *Id.* at 12-13. Moreover, approximately 15% of those polled believed that Chinese Americans were "[m]ore willing than others to use shady practices," and also that Chinese Americans are "two-faced" and "conceited." *Id.* at 13; *see also* Thomas B. Edsall, *25% of U.S. View Chinese Americans Negatively,*

[13] *Amici* believe this report to be among the most comprehensive studies available on discrimination against Asian-Pacific Americans in public contracting.

Poll Says, Wash. Post, Apr. 26, 2001, at A4 (discussing Committee of 100 survey results).[14] Disturbingly, the underlying racism that gave rise to *Korematsu* still appears to be with us today, and forms the backdrop that this Court should consider in assessing Congress' efforts to remedy discrimination in the public contracting context.

III. THE DBE PROGRAM ADDRESSES THE SUBSTANTIAL EVIDENCE OF DISCRIMINATION AGAINST ASIAN-PACIFIC AMERICANS IN GOVERNMENT CONTRACTING

In creating the DBE Program, Congress recognized that the broad history of discrimination against Asian-Pacific Americans includes discrimination in government contracting. Congress repeatedly has considered the issue of discrimination against Asian-Pacific Americans in government construction procurement contracts, finding each time that racial discrimination against Asian-Pacific Americans and its continuing effects have distorted the market for public contracts. *See infra* § III.A. Congress' findings and other evidence show that, in the government contracting context, Asian-Pacific Americans are victims of both direct discrimination, which prevents them from receiving government contracts, and indirect discrimination,

[14] The results of this survey are supported by other examples of discriminatory behavior in public life. High-profile incidents include former Senator Alfonse d'Amato's caricaturing Judge Lance Ito (a U.S.-born citizen who speaks with a standard American accent) in "an exaggerated Japanese accent," *see* Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 176 (1995), and recent incidents of race-based violence against Asian-Pacific Americans, *see* NAPALC, *Audit of Violence Against Asian-Pacific Americans* (1999) (copy lodged with the Clerk of the Court); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926 (1993).

which prevents them from acquiring the training, connections, and financing to compete on an equal basis for government contracts. Those findings necessitate and justify the rebuttable presumption at the heart of the DBE Program that Asian-Pacific-American-owned businesses are disadvantaged in government contracting.

A. Congress Made Extensive Findings That Asian-Pacific Americans Suffer Direct Discrimination In Government Contracting

Prior to the enactment of the DBE Program, Congress made findings in the Small Business Act ("SBA"), 15 U.S.C. § 631, that minorities, including Asian-Pacific Americans, are "socially disadvantaged because of their identification as members of a group that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." 15 U.S.C. § 631(f)(1)(B) (2000). Moreover, federal courts considering allegations of racial discrimination against Asian-Pacific Americans in public contracting have recognized Congress' extensive findings in the SBA. As one federal court explained, "Congress has made findings specific to Asian Americans . . . and post-enactment evidence bolsters those findings." *Rothe Dev. Corp.* v. *United States Dept. of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999) (holding that congressional findings regarding discrimination in public contracting against Asian-Pacific Americans and others were sufficient to justify a race-conscious federal program that benefited a Korean-American contractor). *See also M.C. West, Inc.* v. *Lewis*, 522 F. Supp. 338, 347 (D. Tenn. 1981) (stating that "MBE programs . . . of the Secretary of Transportation are valid efforts to promote minority businesses. . . . Congress has found that minority businesses are in need of remedial assistance . . . particularly in the construction industry. . . .").

To ensure that the DBE Program complies with this Court's ruling in *Adarand I*, Congress made specific findings regarding racial discrimination against Asian-Pacific Americans and others in public contracting. *See* Notice: Proposed Reforms to Affirmative Action in Federal Procurement, *Appendix – The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26042, 26050-63 (May 23, 1996) ("*Compelling Interest*") (citing approximately thirty congressional hearings since 1980 regarding discrimination against MBEs). For instance, Congress found that "11 percent of Asian business owners had experienced known instances of discrimination in the form of higher quotes from suppliers." *Id.* at 26061. Congress further found that "studies show underutilization by state and local governments" of businesses owned by Asians. *Id.* In particular, Congress found that Asian-Pacific-American-owned businesses receive, on average, only 60 cents of each dollar "of state and local expenditures that those firms would be expected to receive, based on their availability." *Id.* at 26061-62.

Statements by members of Congress also brought to light specific evidence of discrimination in government contracting against Asian-Pacific Americans. For example, Representative Norton stated that affirmative action programs are "still desperately needed." 144 Cong. Rec. H3945-02, 3959 (May 22, 1998) (statement of Rep. Norton). She explained that an Urban Institute Report found that disparities between the number of contracts awarded to Asian-Pacific-American-owned businesses and the number they would have been expected to receive were "more pronounced" in areas where there were no affirmative action programs in place, and that, in such instances, the percentage of awards for Asian-Pacific Americans fell to a mere 13% of what would be expected in the absence of discrimination. *See id.; see also* 144 Cong. Rec. S1395-01, 1430 (Mar. 5,

1998) (statement of Sen. Kennedy) (the DBE Program gives minorities, including Asian-Pacific Americans, "a fair chance to succeed" in the face of clear and convincing evidence of discrimination).

In implementing the DBE Program, the Department of Transportation recognized Congress' findings with respect to discrimination against Asian-Pacific Americans in the government contracting field. The Department stated, "Congress has determined that Asian Americans are presumptively disadvantaged (a judgment that can be supported by a substantial history of discrimination against many Asian groups in this country)." Participation by Disadvantaged Business Enterprises in the Dep't of Transportation Programs, 62 Fed. Reg. 29548, 29550 (May 30, 1997).

Current findings support Congress' conclusions. To keep Congress abreast of the effects of the Department of Transportation's DBE Program, the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3009, 112 Stat. 107, 357 (1998), requires the U.S. General Accounting Office ("GAO") to conduct periodic assessments of the DBE Program. In its June 2001 report, the GAO notes industry officials at the agencies it surveyed cited factors such as limited access to bonding, working capital and credit, and prequalification requirements as limiting the ability of DBEs to obtain contracts. *See* U.S. General Accounting Office, *Report to Congressional Committee: Disadvantaged Business Enterprises* 7 (June 2001) ("June 2001 GAO Report") (copy lodged with the Clerk of the Court).

Congress' findings are well supported by academic and statistical studies, which have found particularly pernicious discrimination against Asian-Pacific Americans in government contracting. *See, e.g.*, Theodore Hsien Wang, *Swallowing Bitterness: The Impact of the California Civil*

Rights Initiative on Asian-Pacific Americans, Ann. Survey Am. L. 463 (1995).

> Numerous studies conducted by local governments in California since 1989 have concluded that Asian American businesses continue to face significant discriminatory barriers in competing for government contracts. For instance, from 1990-92, Asian-owned businesses comprised 25.5% of the professional service engineering market in Richmond, California, but received only 3.2% of the city's contracts. In addition, a study of Contra Costa County's procurement practices found that Asian prime contractors failed to receive a single non-federally-funded construction contract during a two-year period in which the county did not have an affirmative action policy. Once the county enacted an affirmative action policy in 1987, about 7% of the county's prime construction dollars were awarded to Asian-owned businesses.

Id. at 469.

Similarly, the San Francisco Unified School District recently reported that it had used discriminatory bidding and contracting procedures, rejecting bids of minority contractors even if they were the lowest bids, and had withheld information from minority contractors, including failing to provide sufficient notice to them. *See* BPA Economics, Inc., *MBE/WBE Policy and MBE/WBE Disparity Study*, Vol. II, Part IV pp. 5-14 (Jan. 1991) (relevant excerpts lodged with the Clerk of the Court) (documenting discrimination against Asian-Pacific American contractors in San Francisco); *see also* National Economic Research Associates ("NERA"),

The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward, Executive Summary, Table B, and Ch. 6 (March 1993) ("*Hayward Report*") (copy lodged with the Clerk of the Court) (documenting discrimination against Asian-Pacific-American-owned businesses in Hayward, California). California's experience is typical of the discrimination that exists nationwide against Asian-Pacific-American-owned businesses in government contracting. *See, e.g,* Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans To Be Included in the Affirmative Action Debate*, 32 Gonz. L. Rev. 621, 638 & n.102 (1996-97) (noting Asian-Pacific American contractors' complaints of lack of inclusion in city construction projects in St. Louis, Missouri).

B. Racial Discrimination Also Indirectly Disadvantages Asian-Pacific Americans In Government Contracting

Congress' findings and other evidence of direct discrimination against Asian-Pacific Americans in the government contracting context illustrate the compelling need to remedy such discrimination. Congress, though, recognized additional evidence that shows that Asian-Pacific Americans also struggle with indirect forms of discrimination that insidiously prevent them from starting and developing contracting businesses. As Congress noted, "[m]inority-owned firms face troubles" in obtaining financing to begin a business; once formed, minority-owned business face similar difficulties in gaining access to capital for investments necessary for business development." *Compelling Interest*, 61 Fed. Reg. at 26058.[15] As

[15] The situation that Asian-Pacific American contractors confront is analogous to that faced by the minority plaintiffs in *White* v. *Regester*, 412 U.S. 755 (1973). There, the Court found not simply that the percentage of minority legislators was less than the percentage of

(Continued ...)

demonstrated below, the relatively few Asian-Pacific Americans who are able to start businesses face discriminatory hurdles that limit their ability to compete for government contracts.

1. Discrimination In Financing And Lending

Financial institutions historically have utilized discriminatory practices against Asian-Pacific Americans and other minorities, including requiring minorities to meet criteria different from those required of white borrowers and requiring greater collateral from minorities than from white business owners. Congress has recognized that "[o]ver and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with identical collateral and borrowing

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(... Continued)
minority voters in certain counties in Texas but also that minority voters "generally [were] not permitted to enter into the political process in a reliable and meaningful manner." *Id.* at 765 (discussing African-American voters); *see also id.* at 769 (discussing Mexican-American voters). The Court based these findings on evidence that minorities had experienced a history of discrimination, that they continued to suffer from the effects of such discrimination, that certain legal requirements (though not in themselves invidious) made it more difficult for minority candidates to win office, and that African-Americans were not slated by a white-dominated organization that effectively controlled Democratic Party candidate slating in Dallas County. *See id.* at 766-68. Here, there is a disproportion between the percentage of Asian-Pacific American-owned businesses and the percentage of contracts awarded to Asian-Pacific-American-owned businesses. But here, as in *White*, there is much more than a mere disproportion. Here, in a manner analogous to that faced by the minorities in *White*, there is evidence that minorities are not permitted to participate in the contracting process in a meaningful matter because of the combination of a variety of forms of discrimination discussed below.

credentials." *Compelling Interest*, 61 Fed. Reg. at 26057-58; *see also* NERA, *Hayward Report*, at 6-14; *see also* Willie E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 San Diego L. Rev. 583, 683 & nn. 11, 138 (1996).

As an illustration, according to the 1987 Economic Census, 16.9% of businesses owned by white males were started by means of a commercial bank loan, versus only 13% of Asian-Pacific-American-owned businesses. *See* The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 37 (October 1996) (copy lodged with the Clerk of the Court) (citing the 1987 U.S. Economic Census). This means that Asian-Pacific Americans are only about 75% (13% divided by 16.9%) as likely as their white counterparts to begin their businesses through commercial bank financing. For many Asian-Pacific Americans who are unable to borrow money from commercial lenders to start businesses, the only recourse is either to borrow from families or friends or to forego any hope of starting a business. *See id.* at 38 ("Asian business owners . . . rely far more heavily on family and friends as sources of start-up capital than do nonminority males."); *Economic Diversity, Issues & Policies* 49 (Paul Ong ed. 1994) (finding that 20% of Asian-Pacific Americans relied on loans from family and friends as their primary source of start-up capital, making them twice as likely as non-minorities to do so).

2. Discrimination In The Development Of Human Capital

Asian-Pacific Americans also experience racial discrimination in the development of the human capital necessary to compete in public contracting. Important

factors for success in public contracting include a business owner's experience and contacts. As Congress found, however, deep-rooted discrimination in the contracting field stymies Asian-Pacific Americans' ability to gain that necessary experience. *See Compelling Interest,* 61 Fed. Reg. at 25055-60. Prior to the 1960s, minorities, including Asian-Pacific Americans, "were segregated into menial, low wage positions," which "left minorities unable to gain the experience needed to operate all but the smallest businesses . . . located in segregated neighborhoods, and serving an exclusively minority clientele" and precluded them from developing contacts in mainstream business communities. *Id.* at 26055. Without experience and contacts, Asian-Pacific Americans have greater difficulty than their white competitors developing business, securing contracts, and obtaining bonding. *See id.* at 26060 (noting that experience often is required to obtain surety bonds necessary to secure large government contracts).

Because Asian-Pacific Americans were denied the equal opportunity even to enter the United States until a mere forty years ago, *see supra* § II.A., many are recent immigrants. As a result of this discriminatory exclusion by the federal government, Asian-Pacific Americans, as a group, have been deprived of the opportunities to obtain some of the same business experience, including the opportunity to inherit family businesses, as their white counterparts. Indeed, Asian Pacific American business owners have the disadvantage of having had little work experience prior to starting their own businesses. Nearly a quarter of Asian Pacific American business owners began their businesses with less than two years of work experience, and another third with two to nine years of work experience. These figures contrast sharply with the figures reflecting the work experience of white male business owners, 54% of whom have had at least ten years of work experience. *See* U.S. Bureau of Census, *1992 Economic Census: Characteristics of Business Owners* at 41,

available at http://www.census.gov/prod/3/97/pubs/cbo-9201.pdf.[16]

3. Discrimination By Labor Unions

Asian-Pacific Americans also suffer discrimination from unions, membership in which often is a prerequisite to obtaining contracting jobs. *See Compelling Interest*, 61 Fed. Reg. 26,055 ("Discrimination by unions has been recognized as a major factor in preventing minorities from obtaining employment opportunities in the skilled trades.") Asian-Pacific Americans historically have faced great obstacles in the form of discriminatory legislation blocking their membership in unions at both the federal and local levels. *See* Gregory Defreitas, *Unionization Among Racial and Ethnic Minorities*, 46 Indus. and Labor Relations Rev. 284 (1993) (discussing how citizenship and immigration laws were used to exclude Asian-Pacific Americans from unions). In addition to the legal barriers that kept Asian-Pacific Americans out of unions, they also were subjected to frequent employer efforts to forestall union solidarity through pitting minority employees against union efforts and to "explicit bans on Asian Pacific American membership in most AFL unions." *Id.* at 290. "As a result, at least until the 1940s, Asian Pacific American unionization was often limited to ethnically segregated 'blood unions' or to guild-

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[16] The relatively short time spent prior to starting their own businesses may result from the "glass ceiling" effect, where minorities are unable to advance and thus begin to believe that starting their own businesses will provide better opportunities. This belief is not unreasonable in light of the findings of the Federal Glass Ceiling Commission, which documented the paucity of Asian-Pacific Americans in corporate, upper-management, and executive positions. The Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Capital* 111 (Mar. 1995) (relevant excerpts lodged with the Clerk of the Court) (finding that "Asian and Pacific Islanders feel they are being held back by a glass ceiling"); *see also supra* § II.B.

like associations confined to joint-credit pools and social events." *Id.*

As recently as the late 1980s, when 19.2% of all American workers belonged to a union, only 12.5% of Asian American workers were union members, the lowest percentage of any ethnic group, including non-minorities. *Id.* at 292; *see also id.* ("Asian workers average the lowest [union] coverage of all groups."). Moreover, "[e]ven after Title VII went on the books, . . . unions precluded minorities from membership through a host of discriminatory policies, including the use of tests and admissions criteria which have no relation to on-the-job skills and which have a differential impact on minorities." *Id.* (internal quotation marks and brackets omitted); *see also* NAPALC, Public Contracting, at 36 ("many unions and trade associations still practice both overt and subtle race . . . discrimination").

4. Discrimination In Bonding

Asian-Pacific Americans also face discrimination in bonding, another prerequisite for many government contracts. Almost half (42%) of minority business owners attending a City of Hayward public hearing cited bonding as a particular problem. *See Hayward Report*, Executive Summary, p. 1 of Table B. Many Asian-Pacific Americans "expressed dissatisfaction with their access to information about bond requirements, and indicated that surety agents sometimes provided them with unclear information about denials or changes in requirements." NAPALC, Public Contracting, at 31. Also, "[s]ome non-bonded minority firms indicated that the financial commitment required of them for a bond was too large for them to accept." *Id.*

Further, a U.S. General Accounting Office report states that many minority construction firms, including those owned by Asian-Pacific Americans, no longer even attempt

to secure surety bonds for reasons including the amount of the necessary financial commitment. *See* U.S. General Acc'g Office, *Small Business: Construction Firms' Access to Surety Bonds* 47 (June 1995) ("June 1995 GAO Report") (copy lodged with the Clerk of the Court). Specifically, as compared to white-male-owned firms, minority firms, including Asian Pacific American firms "[1] less frequently reported that they were not required to obtain bonds or did not bid on bonded jobs; [2] more frequently did not apply for bonds because they did not think they would get them; [3] were more likely to use cash instead of bonds to secure construction contracts; and [4] more frequently performed work in partnership or in a joint venture with a bonded firm." NAPALC, Public Contracting, at 32 (citing the June 1995 GAO Report).

Moreover, the cost of bonding can vary significantly, which has a disproportionate effect on minorities when bonding agents often discriminate. For instance, "the cost of a $1 million bond for a well-established firm would be approximately $13,000; that same bond could cost three or four times more for a new, small, and, inexperienced firm." George R. La Noue & John C. Sullivan, *Race Neutral Programs in Public Contracting*, 55 Public Admin. Rev. 348, 352 (1995) ("*Race Neutral Programs*"). Because most Asian-Pacific-American-owned firms are small and inexperienced, *see* discussion of 1992 Economic Census, *supra* § III.B.2. (depicting lack of experience of Asian Pacific American firm owners), this cost differential consequently has a racially discriminatory effect. Also, "'[c]haracter, credit, and capability' are the most frequently expressed measures weighed by a surety in making bonding decisions," but "[t]hese factors are inherently discretionary and some believe discriminatory." La Noue & Sullivan, *Race Neutral Programs*, at 352 (noting that one interviewee stated, "The bonding industry is the most racist industry I know of...[u]nderwriting standards are too subjective.").

5. Discrimination By Prime Contractors and Suppliers

Prime contractors are an additional source of discriminatory conduct against Asian-Pacific Americans. As Congress found, "[a]nother factor restricting the ability of minority-owned businesses to compete in both private and public contracting is discrimination allowing non-minority subcontractors and contractors to get special prices and discounts from suppliers which are not available to minority purchasers." *Compelling Interest,* 61 Fed. Reg. at 26061 (internal quotation marks and brackets omitted)); NAPALC, Public Contracting, at 33 (citing numerous reports and finding that Asian-Pacific American and other minority-owned firms had disproportionately fewer opportunities in the construction industry due to, for example, "'bid-shopping' by white-owned prime contractors who, after the bidding process closes, secretly disclose the lowest bid to majority-owned subcontractors to solicit a lower bid"). Suppliers, too, discriminate against minority-owned businesses. *See Compelling Interest*, 61 Fed. Reg. 26061 & n.123 (special prices and discounts given by suppliers to white-owned firms restrict the ability of minority-owned businesses to compete). Indeed, 11% of Asian business owners "had experienced known instances of discrimination in the form of higher quotes from suppliers." *Id.* Numerous other state and local studies have reported similar findings. *See id.* As a result, Asian-Pacific Americans face higher business costs, cannot compete for certain contracts, and, on the contracts that they do win, earn lower profits.

IV. CONCLUSION

Cognizant of the widespread discrimination against Asian-Pacific Americans throughout American history, Congress investigated discrimination in the government contracting field and discovered the sad truth that

discrimination hinders Asian-Pacific Americans at every turn from competing on a fair basis. In light of its findings, Congress recognized its compelling interest in remedying this discrimination and its effects and created the narrowly tailored DBE Program to address that interest. Unlike other affirmative action programs, the DBE Program accomplishes its goal by creating a rebuttable presumption in favor of members of certain groups that Congress found face unfair challenges resulting from a demonstrated history of discrimination in government contracting. With respect to Asian-Pacific Americans, Congress' findings and the substantial evidence of discrimination more than justify that presumption.

Dated: August 10, 2001

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In The
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF WOMEN FIRST NATIONAL LEGISLATIVE COMMITTEE, ET AL., *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE OF THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

INTEREST OF AMICI CURIAE.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....5

I. IN ORDER TO PREVAIL, PETITIONER MUST ESTABLISH THAT THE STATUTES AND REGULATIONS CANNOT BE APPLIED IN A CONSTITUTIONAL MANNER UNDER ANY SET OF CIRCUMSTANCES.....5

II. CONGRESS AND DOT HAD A STRONG BASIS IN EVIDENCE FOR CONCLUDING THAT RACE AND GENDER DISCRIMINATION HAVE HARMED MINORITY- AND WOMEN-OWNED FIRMS IN TRANSPORTATION-RELATED GOVERNMENT CONTRACTING.....6

III. THE NARROW TAILORING ANALYSIS EXAMINES SEVERAL FACTORS. IT IS NOT A SINGLE, RIGID TEST.....8

IV. CONGRESS ADOPTED THE CURRENT PROGRAM ONLY AFTER CONSIDERING RACE- AND GENDER-NEUTRAL ALTERNATIVES.....10

V. THE PROCESS OF DETERMINING ELIGIBILITY FOR THE SDB AND DBE PROGRAMS IS NARROWLY TAILORED.....12

A. The Presumption is Rebuttable.....12

B. Program Eligibility Is Limited To Persons Who Are Economically Disadvantaged.....15

C. The Different Treatment Resulting From The Presumption Is Limited To The Burden Of Proof Placed On Applicants; All Applicants Are Subjected To An Individualized Inquiry.....15

D. The Presumption Applies to Groups Found By Congress To Have Been Harmed By Discrimination.....17

VI. DOT REQUIRES THE USE OF RACE- AND GENDER-NEUTRAL ALTERNATIVES BEFORE RACE OR GENDER-CONSCIOUS REMEDIES CAN BE IMPLEMENTED.....18

VII. THE PROGRAMS LAST NO LONGER THAN NECESSARY.....19

VIII. THE ASPIRATIONAL GOALS ARE NARROWLY TAILORED.....20

IX. THE PROVISIONS GOVERNING THE GEOGRAPHICAL SCOPE OF THE PROGRAMS ARE NARROWLY TAILORED.....23

X. PETITIONER HAS NOT CHALLENGED THE GENDER-BASED CLASSIFICATION

IN THE STATUTES OR REGULATIONS WHICH, IN ANY EVENT, SATISFY BOTH STRICT AND INTERMEDIATE SCRUTINY. 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Mineta,
121 S. Ct. 1598 (2001) 3

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) ..... *passim*

Adarand Constructors, Inc. v. Slater,
228 F.3d 1147 (10th Cir. 2001) 2, 25, 26

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 27

Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989) 9

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 27

Buckley v. Valeo,
424 U.S. 1 (1976) 27

Bush v. Vera,
517 U.S. 952 (1996) 9

Califano v. Goldberg,
430 U.S. 199 (1977) 29

Califano v. Webster,
430 U.S. 313 (1977) 29

Champlin Refining Co. v. Corporation Commission of Oklahoma,
286 U.S. 210 (1932) 27

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 13

City of Richmond v. J.A. Croson Co.
488 U.S. 469 (1989) ..... *passim*

Fullilove v. Klutznick,
448 U.S. 448 (1980) ..... *passim*

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 29

Nguyen v. INS,
121 S. Ct. 2053 (2001) 9, 28

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 28

Rust v. Sullivan,
500 U.S. 173 (1991) 5, 6

Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 17

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997) 8

United States v. Mead Corp.,
121 S. Ct. 2164 (2001) 13

United States v. Salerno,
481 U.S. 739 (1987) 6

United States v. Paradise,
480 U.S. 149 (1987) 9, 11

United States v. Virginia,
518 U.S. 515 (1996) 10, 28

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 6, 9, 25

STATUTES

13 C.F.R. Part 121 (2000) 15
13 C.F.R. Part 124 (2000) 3, 12
13 C.F.R. § 124.103 (2000) 2, 13, 16, 18
13 C.F.R. § 124.1002 (2000) 13, 15
13 C.F.R. § 124.1008 (2000) ..... *passim*
13 C.F.R. § 124.1011 (2000) 16
13 C.F.R. § 124.1014 (2000) 20
13 C.F.R. § 124.1016 (2000) 14, 20
13 C.F.R. § 124.1017 (2000) 14

48 C.F.R. Part 19 (2000) 1, 3
48 C.F.R. § 19.001 (2000) 12
48 C.F.R. § 19.703 (2000) 14
48 C.F.R. § 19.705-4 (2000) 20
48 C.F.R. § 19.705-7 (2000) 2
48 C.F.R. § 19.1101 (2000) 2

48 C.F.R. § 19.1201 (2000) 2
48 C.F.R. § 19.1203 (2000) 2

49 C.F.R. Part 26 (2000) ..... *passim*
49 C.F.R. § 26.29 (2000) 19
49 C.F.R. § 26.41 (2000) 20, 21
49 C.F.R. § 26.43 (2000) 21
49 C.F.R. § 26.45 (2000) ..... *passim*
49 C.F.R. § 26.51 (2000) 18, 19, 23, 25
49 C.F.R. § 26.65 (2000) 15
49 C.F.R. § 26.67 (2000) ..... *passim*
49 C.F.R. § 26.73 (2000) 16
49 C.F.R. § 26.83 (2000) 16, 20
49 C.F.R. § 26.87 (2000) 14

15 U.S.C. § 631 (2000) 29
15 U.S.C. § 637 (2000) 2, 12, 18
15 U.S.C. § 644 (2000) 21
15 U.S.C. § 645 (2000) 16

18 U.S.C. § 1001 (2000) 16

31 U.S.C. § 3729 (2000) 16

Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1919 26

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 26

Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). 19, 21, 26, 27

LEGISLATIVE HISTORY

134 Cong. Rec. 27816 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27817 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27818 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27819 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27820 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27821 (Oct. 3, 1988) 8, 27, 28, 29

144 Cong. Rec. H3960 (May 22, 1998) 13
144 Cong. Rec. H3958 (May 22, 1998) 6
144 Cong. Rec. H3959 (May 22, 1998) 6

144 Cong. Rec. S1401 (Mar. 5, 1998) 11
144 Cong. Rec. S1402 (Mar. 5, 1998) 13
144 Cong. Rec. S1403 (Mar. 5, 1998) 11
144 Cong. Rec. S1404 (Mar. 5, 1998) 11
144 Cong. Rec. S1409 (Mar. 5, 1998) 7, 11
144 Cong. Rec. S1420 (Mar. 5, 1998) 11
144 Cong. Rec. S1421 (Mar. 5, 1998) 11
144 Cong. Rec. S1425 (Mar. 5, 1998) 11
144 Cong. Rec. S1426 (Mar. 5, 1998) 11
144 Cong. Rec. S1490 (Mar. 6, 1998) 7

61 Fed. Reg. 26042 (May 23, 1996) ..... *passim*
63 Fed. Reg. 35713 (June 30, 1998) 23, 24, 25
64 Fed. Reg. 5096 (Feb. 2, 1999) 13, 15, 22
64 Fed. Reg. 52806 (Sept. 30, 1999) 20, 24, 25

H.R. Rep. 100-736 (1988) 7, 8, 27, 29
H.R. Rep. 100-955 (1988) 7, 28

S. Rep. No. 100-4 (1987)..... 7

ISTEA's Race Based Set Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the Senate Comm. on the Judiciary, 105th Cong. 117-23 (1997) 7

New Economic Realities: The Role of Women Entrepreneurs, Hearing Before the House Comm. on Small Bus., 100th Cong. 3-158 (1988) 7, 27, 28

GAO, Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information is Needed to Understand Program Impact (June 2001)..... 8

OTHER AUTHORITY

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INTEREST OF AMICI CURIAE

This brief is respectfully submitted on behalf of Women First National Legislative Committee, the Illinois Association of Women Contractors and Entrepreneurs, the Federation of Women Contractors, the National Women's Law Center, and the National Partnership for Women and Families ("Women Amici") as amici curiae.[1]

The Women Amici include organizations which represent small businesses owned by women of different races that operate and compete within the transportation-related (including airport, highway, and transit) construction industry. These businesses have been certified as Disadvantaged Business Enterprises under the federal grant program administered by the United States Department of Transportation ("DOT"). 49 C.F.R. Part 26 (2000). They have experienced firsthand the detrimental effects of the discriminatory practices which, to this day, continue to plague the construction industry. As a result of this discrimination, the ability of women-owned businesses to compete for government contracts in the transportation-related area has been severely hampered. Consequently, these firms have a strong interest in affirming the constitutionality of the statutory and regulatory regimes currently under review.[2]

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[1] Additional information concerning these amici is provided in the appendix. Counsel for the Women Amici were the sole authors of this brief. No person or entity other than the Women Amici made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the submission of this brief. These consents have been filed concurrently herewith.

[2] The Women Amici note that there is some uncertainty over which aspects of DOT's affirmative action programs are properly before this Court. Currently, DOT has two principal programs for assisting disadvantaged businesses: (1) the Small Disadvantaged Business or "SDB" program, which operates in connection with direct federal contracting; and (2) the Disadvantaged Business Enterprise or "DBE" program, which provides federal grants to state and local governments for use in their contracting activities. *Compare* 48 C.F.R. Part 19 (2000) *with* 49 C.F.R. Part 26 (2000).

The Women Amici also include non-profit, legal advocacy organizations dedicated to the protection and advancement of women's rights and the corresponding elimination of gender and other forms of discrimination from all facets of American life. These organizations have an equally strong interest in affirming the constitutionality of the statutes and regulations under review. For decades, they have concentrated their efforts on promoting equal opportunity for women in a variety of important areas, including family, employment, education, economic security, and healthcare. They have participated as counsel and

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While women are presumptively eligible to participate in the DBE program, they are not presumptively eligible to participate in the SDB program. *Compare* 49 C.F.R. § 26.67(a) (2000) *with* 13 C.F.R. § 124.1008(e) (2000) (incorporating 13 C.F.R. § 124.103 (2000)). Thus, any discussion of both race- and gender-conscious measures in this brief refers to the DBE program only.

Furthermore, Petitioner originally challenged only the race-conscious provision of one particular provision of the SDB program—specifically, the use of a Subcontractor Compensation Clause ("SCC") by a division of DOT. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205-06 (1995) ("*Adarand I*"). DOT has since discontinued the use of this particular clause, *see* Lodging of Women Amici ("Lodging") at 13 (filed concurrently herewith), and Petitioner has not presented any evidence or provided any argument that this clause will ever be reinstated. *See* Pet.'s Br. (*passim*). Instead, Petitioner has attempted to broaden its challenge before this Court, recasting it as a general attack on the entire SDB program. *See* Pet.'s Br. at 12-17 & nn.9-11. This program consists of a number of contractual clauses authorized by statute and DOT regulations. *See* 15 U.S.C. § 637(d)(4)-(6); *see also* 48 C.F.R. § 19.705-7 *et seq.* (2000) (liquidated damages); 48 C.F.R. § 19.1101 *et seq.* (2000) (price evaluation adjustments); 48 C.F.R. § 19.1201 *et seq.* (2000) (evaluation factors); 48 C.F.R. § 19.1203 (2000) (monetary incentives). The Tenth Circuit, however, found that Petitioner only had standing to challenge the use of the SCC and related provisions, which were the subject of the original complaint. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1160 (10th Cir. 2000) ("*Adarand III*").

For this reason, the Women Amici respectfully request that the Court limit its review to only the SCC and related provisions. However, in the event that the Court is inclined to consider the merits of Petitioner's other arguments, the Women Amici have briefed these issues for consideration. *See* Sections VIII - IX *infra*.

appeared as amici curiae in numerous cases before this Court and the Circuit Courts of Appeal.

Although the Women Amici believe that all of the relevant provisions of these statutes and regulations satisfy both strict scrutiny, which applies to race-conscious programs, as well as intermediate scrutiny, which applies to gender-based classifications, we nevertheless note that Petitioner's original complaint concerned only the use of one particular race-conscious measure which is no longer employed by DOT as part of its affirmative action efforts in direct federal contracting. Indeed, Petitioner has never directly challenged the gender-conscious measures of any federal statute or regulation in this case. Thus, if the Court discerns a constitutional defect in any of the race-conscious aspects of the statutes or regulations currently under review, the Women Amici respectfully request that the Court limit its ruling accordingly, leaving the gender-conscious remedies of any program undisturbed. Finally, while the Women Amici strongly endorse the statutory framework at issue, this brief focuses on the constitutionality of DOT's regulations.[3]

SUMMARY OF THE ARGUMENT

Petitioner is challenging only the most recent versions of DOT programs which have yet to be applied to it. Consequently, the instant challenge is a facial one, and the statutory and regulatory provisions at issue must be upheld unless they cannot be applied constitutionally under any set of circumstances. Petitioner cannot make this showing.

At the time it enacted the challenged statutes, Congress had a strong basis in evidence for concluding that race and gender discrimination had impeded the entry of

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[3] Because only the current regulations are at issue, *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1598 (2001), all future citations to the applicable regulatory provisions refer to those which are set forth in the latest version of the Code of Federal Regulations unless otherwise noted. 13 C.F.R. Part 124 (2000); 48 C.F.R. Part 19 (2000); 49 C.F.R. Part 26 (2000).

minority- and women-owned firms into the transportation-related construction industry and prevented these firms from becoming competitively viable in that industry. In order to further the compelling interest of remedying this discrimination, Congress provided DOT with a broad and flexible statutory authorization to implement a number of regulatory provisions to assist minority- and women-owned businesses, including some measures which take race and gender into account. Consistent with the scope of its congressional authorization, DOT currently employs the race- and gender-conscious provisions of its affirmative action programs in only those regions of the country where there is a contemporaneous finding of discrimination within the construction industry and only to the extent necessary to remedy its effects. Because the statutory scheme is flexible enough to be implemented in a constitutional manner, it survives both strict and intermediate scrutiny.

DOT's regulations for the SDB and the DBE programs are likewise narrowly tailored to further the compelling interest of remedying race and gender discrimination. While both programs have a number of aspects that are relevant to this narrow tailoring analysis, the Court should pay particular attention to three components: (1) the process by which minorities, women and others become eligible to benefit from these programs; (2) the goals for achieving a certain level of contracting by minority- and women-owned firms; and (3) the geographic applicability of the programs. For each of these components, the statutory scheme provides DOT with sufficient flexibility to devise a narrowly tailored program to remedy discrimination that meets constitutional requirements, and, in fact, DOT has done so. DOT's regulations further narrowly tailor the remedial provisions by limiting the time period for eligibility and by allowing persons who are not presumptively eligible to benefit from these programs under some circumstances. DOT's regulations for both the SDB and DBE programs constitute a carefully crafted and

narrowly tailored effort to further the compelling interest in remedying discrimination.

Given the precise manner in which these regulations are designed to address the specific conditions of each locality where they operate, they are constitutional on their face, and there is no record of any unconstitutional implementation of any aspect of either the SDB or DBE program that is currently in effect or likely to be in effect in the future. Nor is there any evidence of any unconstitutional actions by recipients of federal grant funds under the DBE program. Thus, any claim that the new regulations will be applied in an unconstitutional manner is not ripe for review. Because DOT's regulations for both the SDB and DBE programs constitute a carefully crafted and narrowly tailored effort to further the compelling and important interests in remedying discrimination, they survive strict scrutiny.

For all of these reasons, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. IN ORDER TO PREVAIL, PETITIONER MUST ESTABLISH THAT THE STATUTES AND REGULATIONS CANNOT BE APPLIED IN A CONSTITUTIONAL MANNER UNDER ANY SET OF CIRCUMSTANCES.

It is undisputed that DOT has discontinued the use of the particular contractual clause which initially gave rise to this lawsuit, *see* Lodging by *Amici Curiae* Women First National Legislative Committee, et al. ("Lodging") at 13 (filed concurrently), and Petitioner makes no claim of injury from any DOT program currently in effect. Consequently, Petitioner's challenge is a facial one. Thus, as in *Fullilove v. Klutznick*, 448 U.S. 489 (1980), all "doubts must be resolved in support of the...judgment" of Congress in this area, 448 U.S. at 489, and the program can only be struck down if Petitioner can "establish that no set of circumstances exist under which the Act would be valid." *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (noting further that the

"'fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid'") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (alteration in original). By definition, this is a "heavy burden" to bear, *Salerno*, 481 U.S. at 745, which cannot be successfully carried if "the regulations are both authorized by the Act [in question] and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights." *Rust*, 500 U.S. at 183. Given the facts of this case, Petitioner cannot make this showing.

II. CONGRESS AND DOT HAD A STRONG BASIS IN EVIDENCE FOR CONCLUDING THAT RACE AND GENDER DISCRIMINATION HAVE HARMED MINORITY- AND WOMEN-OWNED FIRMS IN TRANSPORTATION-RELATED GOVERNMENT CONTRACTING.

When they adopted the statutes and regulations at issue, Congress and DOT both possessed the requisite "'strong basis in evidence,'" *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)), for concluding that race and gender discrimination had harmed—and was continuing to harm—minority- and women-owned firms in the construction industry.[4] As the

[4] As Representative Holmes-Norton explained during the 1998 congressional debate on the topic, there have been "at least 29 hearings on this subject between 1980 and 1995...and...an additional eleven [more] through the end of 1997...." 144 Cong. Rec. H3958 (May 22, 1998) (statement of Rep. Holmes-Norton). Indeed, few matters appear to have been more thoroughly evaluated by the national legislature. Furthermore, Congress has conducted and been presented with numerous disparity and other statistical studies, in addition to hearing countless personal testimonials, which all show that there is a serious problem of race and gender discrimination at all levels of the construction industry. *Id.* at H3958-59. The Department of Justice has summarized these extensive findings, which are far too voluminous to recount here, in the Federal Register. *See* 61 Fed. Reg. 26042, 26050-63 (May 23, 1996).

Fullilove Court found over twenty years ago, "Congress had [an] abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination" in federal contracting. 448 U.S. at 478. Unfortunately, due to the entrenched nature of discrimination in this industry, the evidentiary foundation—and overwhelming need—for congressional action has only solidified with time. *See, e.g.*, Section IV *infra*.

Congress has also found that women have been harmed by discrimination in their efforts to enter and compete in the transportation-related contracting arena. For example, women-owned firms have been excluded from contracting opportunities by the same "good old boy" network which has discriminated against minority firms. *See, e.g., ISTEA's Race Based Set Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong., at 117-23 (1997) (statement of Janet Schutt); *see also* H.R. Rep. No. 100-736, at 7-27, 27-57 (1988); *New Economic Realities: The Role of Women Entrepreneurs, Hearing Before the House Comm. on Small Businesses*, 100th Cong., at 3-158 (1988). In addition, women-owned firms have historically earned only half of what comparable male-owned companies receive in this industry. *See, e.g.*, 144 Cong. Rec. S1409 (Mar. 5, 1998) (statement of Sen. Kerry); *see also id.* at S1490 (Mar. 6, 1998) (statement of Sen. Lautenberg) (noting the additional problems women-owned firms have in obtaining financing despite their "lower rate of loan delinquency"); *accord* H.R. Rep. No. 100-736, at 13-18 (same). It was for these reasons that women were designated as a presumptively disadvantaged group for purposes of the DBE program. *See* S. Rep. No. 100-4, at 11 (1987) (noting how "barriers still remain, preventing minorities and women from successfully competing in the industry"); H.R. Rep. No. 100-955, at 9-17 (1988) (discussing the historical practices of gender discrimination in the construction, lending, and bonding

industries); *see also* 134 Cong. Rec. 27816-21 (Oct. 3, 1988) (referring to the findings of H.R. Rep. No. 100-736).

While Petitioner attempts to find fault with selected studies and other limited pieces of evidence considered by Congress, *see* Pet.'s Br. at 32-33, the record supporting the congressional findings in this area is so substantial that the current challenge to only a limited number of studies cannot undermine the conclusion that Congress had a strong basis in evidence to enact the race- and gender-conscious provisions at issue. At a minimum, Congress is entitled to consider competing studies, in addition to other evidence, and come to a conclusion regarding the weight to be given to each. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (explaining that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process" and that, as a result, the courts "must give considerable deference...to Congress' findings and conclusions").

Moreover, DOT is entitled to rely on the evidence available to Congress as well as Congress' subsequent findings based on this evidence. DOT may also rely on the evidence which it collected when carrying out its statutory authority to implement race- and gender-conscious programs to remedy the discriminatory practices that Congress found within the construction industry. *See, e.g.*, GAO, Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information is Needed to Understand Program Impact 38-40 (June 2001) (noting the decline in minority and women contracting when Minnesota and Louisiana canceled their DBE programs). Because the body of evidence collected by Congress and DOT in this area is so overwhelming, it is clear DOT also had sufficient evidence upon which to act.

III. THE NARROW TAILORING ANALYSIS EXAMINES SEVERAL FACTORS. IT IS NOT A SINGLE, RIGID TEST.

In determining whether a race-conscious remedy is narrowly tailored to serve a compelling governmental

interest, this Court has "look[ed] to several factors, including the necessity for the relief and the efficacy of alternate remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987); *see also Adarand I*, 515 U.S. at 237-38 (also asking "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'") (quoting *Croson*, 488 U.S. at 507; *Fullilove*, 448 U.S. at 513).

While rigorous, this calculus does "not require[] remedial plans to be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508; *see also Bush v. Vera*, 517 U.S. 952, 977 (1996) ("reject[ing], as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria'") (citation omitted); *accord Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989) ("In requiring [a regulation] to be 'narrowly tailored'..., we have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'") (citations omitted). Put differently, "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'...." *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring). Instead, as the *Bush* Court explained, the government is afforded "a limited degree of leeway" or flexibility when acting to further a compelling interest. 517 U.S. at 977. This tailoring requirement is even further relaxed when a gender-conscious program is at issue. *See, e.g., Nguyen v. INS*, 121 S. Ct. 2053, 2059 (2001) (explaining that, under intermediate

scrutiny, the measure must be substantially related to an important government interest) (relying on, *inter alia*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*")).

Thus, neither strict nor intermediate scrutiny is intended to be "fatal in fact" by establishing an impossibly high standard which no program could ever meet. *See Adarand I*, 515 U.S. at 237; *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring); *see also VMI*, 518 U.S. at 533-34. Instead, the purpose of this analysis is to "smoke out" illegitimate uses of race or gender "by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*, 488 U.S. at 493; *accord VMI*, 518 U.S. at 532-36. Because Congress and DOT were pursuing such a goal, the statutes and regulations at issue are constitutional.

IV. CONGRESS ADOPTED THE CURRENT PROGRAM ONLY AFTER CONSIDERING RACE- AND GENDER-NEUTRAL ALTERNATIVES.

As Justice Powell noted in *Fullilove*, when Congress first acted "in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts." 448 U.S. at 511 (Powell, J., concurring); *see also Croson*, 488 U.S. at 507 (noting *Fullilove*'s finding that "Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside").

Twenty years later, in 1998, at the time it approved DOT's continued affirmative action efforts, Congress again considered race- and gender-neutral programs and found them to be inadequate. Most notably, Congress considered the results when States dismantled their affirmative action programs and simply relied on the marketplace to determine

who received a given contract. *See, e.g.*, 144 Cong. Rec. S1401, S1404, S1426 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, and Domenici). In these instances, participation by women and minorities in State contracting decreased dramatically, frequently dropping to or close to zero. *See, e.g., id.* at S1409, S1421 (statements of Sens. Kerry and Moseley-Braun). For example, less than one year after Michigan abandoned its minority contracting program, "minority-owned businesses were completely shut out of the State highway construction projects," and "the percentage of highway dollars going to [these] businesses fell to zero." *Id.* at S1409, S1404 (statements of Sens. Kerry and Baucus). However, at the same time, participation by women and minorities in contracting opportunities through DOT's affirmative action program stood at nearly 13 percent. *Id.* This disparity repeated itself across the country, indicating that minority firms which were ready, willing, and able to perform government contract work in this area were nevertheless being impermissibly shut out of these opportunities. *Id.* at S1401, S1404, S1409, S1420-21, S1426 (statements of Sens. Warner, Baucus, Kerry, Moseley-Braun, and Domenici). Based on this and the other evidence available to it, Congress could reasonably and permissibly conclude that race- and gender-neutral measures standing alone would not simply fail to cure the problem of discrimination within the construction industry but, worse, actually work to exacerbate it.

Furthermore, when Congress authorized DOT to use race- and gender-conscious programs, it was aware that DOT would first attempt to implement these programs in a race- and gender-neutral fashion, and DOT has in fact done so. *See id.* at S1403, S1409, S1425 (statement of Sens. Baucus, Kerry, and Domenici); *see also* Section VI *infra*. These are additional factors which demonstrate the narrow tailoring of the SDB and DBE programs. *Cf. Paradise*, 480 U.S. at 200-01 (O'Connor, J., dissenting) (emphasizing the need to consider "available alternative remedies").

V. THE PROCESS OF DETERMINING ELIGIBILITY FOR THE SDB AND DBE PROGRAMS IS NARROWLY TAILORED.

After considering a substantial body of evidence, Congress found that invidious race and gender discrimination had a particularly detrimental effect on certain groups within our society in regard to their ability and efforts to engage in government contracting. *See* Section II *supra*. Congress therefore determined that firms owned and controlled by "socially and economically disadvantaged" individuals should be eligible for certain benefits in the contracting process. This judgment is reflected in a statutory provision which presumes that certain groups are eligible to participate in the SDB and DBE programs administered by DOT. *See* 15 U.S.C. § 637(d)(3)(C) (covering "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration"). This presumption, as administered by DOT, provides the regulatory framework for the eligibility determinations in both the SDB and the DBE program. 48 C.F.R. § 19.001 (incorporating by reference 13 C.F.R. Part 124); 49 C.F.R. § 26.67(a). DOT has adopted a number of regulations to ensure that the presumption is carefully crafted to accomplish the goal of remedying discrimination without placing an undue burden on innocent, non-minority firms.

A. The Presumption Is Rebuttable.

The statutory scheme affords DOT considerable flexibility in determining how to apply the presumption of eligibility. Although the statute "presume[s]" that members of certain minority groups are qualified to participate in either the SDB or DBE programs, 15 U.S.C. § 637(d)(3)(C), this presumption is a rebuttable one. As Petitioner's own authority indicates, this is the plain meaning of the term. *See, e.g.*, 1 *Weinstein's Federal Evidence* § 301.02[1] (2d ed. 2000) ("[I]f a basic fact...is established, then the fact-finder must accept that the presumed fact...has also been

established, *unless the presumption is rebutted.*") (emphasis added); *accord* 2 *McCormick on Evidence* § 344 (5th ed. 1999) (adopting the common meaning of the term "presumption" which "denotes a rebuttable presumption"). It is also the meaning which Congress understood when it most recently considered the matter. *See, e.g.*, 144 Cong. Rec. H3960 (May 22, 1998) (statement of Rep. Holmes-Norton) ("The presumptions of social and economic disadvantage are...rebuttable, not absolute."); *accord id.* at S1402 (Mar. 5, 1998) (statement of Sen. Baucus) (noting that "[i]t is only a presumption, a presumption that can be overcome....").

In accordance with Congress' delegation of authority, DOT has promulgated regulations which are entirely consistent with this statutory framework. *See* 49 C.F.R. § 26.67(a) (requiring the certifying authority to "rebuttably presume" that members of certain groups are qualified to participate in the program); *see also* 13 C.F.R. § 124.103(b) (explaining that it is a "rebuttable presumption" which operates in these instances). These provisions were adopted in accordance with DOT's rule-making authority in this area, *see generally* 64 Fed. Reg. 5096 (Feb. 2, 1999), and Petitioner has made no showing that the challenged regulations are in any way "procedurally defective, arbitrary and capricious in substance or manifestly contrary to the statute." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001); *accord Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (same).

Under the current regulations, the mere process of applying for admission to the SDB and DBE programs triggers an extensive, in-depth, onsite review. *See* Sections V.B – V.D *infra*. In the process, applicants are required to present evidence that they truly qualify for the program. 49 C.F.R. § 26.67(a); 13 C.F.R. §§ 124.1002, 124.1008. The heightened administrative scrutiny paid to these applications further tailors the programs at issue. Indeed, this searching review addresses Petitioner's argument that

individuals will be approved or rejected for the programs based solely on their race or gender. *See* Pet.'s Br. at 41-45. For example, under the DBE program, a certifying authority "may, at any time, start a proceeding to determine whether [a] presumption should be regarded as rebutted" if there is a "reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged." 49 C.F.R. § 26.67(b)(2). Likewise, if "there is reasonable cause to believe that a currently certified firm is ineligible," either the certifying authority or DOT may "initiate a proceeding to remove the firm's certification." 49 C.F.R. § 26.87(b)-(c). Also, "[a]ny person may file...a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why...." *See id.* § 26.87(a).[5] Similarly, under the SDB program, "the contracting officer or the [Small Business Administration] may protest the disadvantaged status of a proposed subcontractor." 48 C.F.R. § 19.703(a)(2); *accord* 13 C.F.R. § 124.1008(e); *see also id.* § 124.1016(a) (allowing the Small Business Administration to reconsider an SDB's status "whenever it receives credible information calling into...question a firm's eligibility"). "Other interested parties may [also] submit information to the contracting officer or the SBA in an effort to persuade [them] to initiate a protest." 48 C.F.R. § 19.703(a)(2); *accord* 13 C.F.R. § 124.1017. These regulations ensure that only qualified firms are admitted into the SDB and DBE programs.

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[5] Pursuant to 49 C.F.R. § 26.87(f), a firm can have its certification revoked if: (1) "[c]hanges in the firm's circumstances since [its] certification...render the firm unable to meet the eligibility standards;" (2) "[i]nformation or evidence not available...at the time the firm was certified" has since come to light; (3) it is discovered that "[i]nformation... was concealed or misrepresented by the firm in previous certification actions;" (4) there is "[a] change in certification standards or requirements by the [DOT];" or (5) a "documented finding that [the] determination to certify the firm was factually erroneous." 49 C.F.R. § 26.87(f). The SDB program contains similar regulations. 13 C.F.R. § 124.1016.

B. Program Eligibility Is Limited To Persons Who Are Economically Disadvantaged.

Additionally, in order to limit benefits of the SDB and DBE programs to only those who need assistance in becoming competitively viable, DOT has imposed a financial cap on applicants to and participants in these programs. 13 C.F.R. §§ 124.1002(c), 124.1008(e)(1); 49 C.F.R. § 26.67(b). Thus, if an "an individual's personal net worth exceeds $750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage." 49 C.F.R. § 26.67(b)(4); *accord* 13 C.F.R. §§ 124.1002(c), 124.1008(e)(1). Moreover, the current DBE and SDB programs impose overall size limitations on the firms themselves, which prevents businesses that have been competitively successful from taking advantage of the program. 49 C.F.R. § 26.65 (incorporating the standards set forth in 13 C.F.R. Part 121); 13 C.F.R. § 124.1002(b) (same). While Petitioner claims that these financial caps could be lower to exclude more people from the program, *see* Pet.'s Br. at 8 n.4, this ceiling is a reasonable approach to balancing the goals of excluding financially successful firms while including firms that have some realistic chance of success in the market. As DOT explained when it promulgated its final rule, "[u]sing a figure any lower...could penalize success and make growth for DBEs difficult (since, for example, banks and insurers frequently look to the personal assets of small business owners in making lending and bonding decisions)." 64 Fed. Reg. at 5117-18.

C. The Different Treatment Resulting From The Presumption Is Limited To The Burden Of Proof Placed On Applicants Who Are All Subjected To An Individualized Inquiry.

Pursuant to 49 C.F.R. § 26.67(a)(1), any business seeking to be certified as a DBE "must...submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically

disadvantaged." In addition, "each individual owner of a firm applying to participate as a DBE...[must] submit a signed, notarized statement of personal net worth, with appropriate supporting documentation." *Id.* § 26.67(a)(2)(i). The SDB program imposes similar requirements. *See* 13 C.F.R. § 124.1008(a), (e). All of this personal and financial information must be included in an application for certification, which is then reviewed by the appropriate authority or agency in order to determine whether an applicant qualifies for the program. *See* 49 C.F.R. § 26.83(e)(2)-(3); *id.* § 26.83(c); *see also* 13 C.F.R. § 124.1008. Thus, each applicant, whether or not he or she is entitled to the presumption, is subjected to an individualized inquiry regarding social and economic disadvantage.[6]

Moreover, individuals who are not presumptively eligible to participate in the DBE and SDB programs may nevertheless still qualify for certification. 49 C.F.R. § 26.67(d); 13 C.F.R. § 124.1008(e)(2). In these instances, these firms only "ha[ve] the burden of demonstrating..., by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged." 49 C.F.R. § 26.67(d); *accord* 13 C.F.R. § 1008(e)(2) (incorporating 13 C.F.R. § 124.103(c)). Thus, the only distinction between persons who qualify for the presumption and those who do not is the burden of proof placed upon them to show they have been harmed by discrimination.

This distinction is not simply an attempt to reduce the administrative burden of identifying persons who have been the victims of discrimination. Instead, it represents a

[6] As an additional incentive to provide accurate and truthful information in these submissions, any misrepresentations in the application process may result in not only a denial of certification but also the imposition of civil or criminal penalties. *See* 49 C.F.R. § 26.73(b)-(c); 13 C.F.R. § 124.1011; *see also* 15 U.S.C. § 645(d); 18 U.S.C. § 1001; 31 U.S.C. § 3729; *cf.* 61 Fed. Reg. at 26045 (advocating increased enforcement of the civil and criminal provisions of federal law which prohibit the making of false or fraudulent statements to the government).

reasonable accommodation among a number of policy goals. After considering substantial evidence, Congress concluded that discrimination in the construction industry had affected women and minorities most severely. Like Title VII's burden-shifting framework, the presumption enables members of these groups to address the particularly "elusive factual question of intentional discrimination." *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 & n.8 (1981). At the same time, program benefits are not available to women and minorities who, given their financial success, have not been adversely affected by discrimination. Basing eligibility on a rebuttable presumption of disadvantage, coupled with a limitation on personal net worth, accomplishes these goals.

Congress also gave DOT the authority to provide benefits to others who had suffered because of other forms of discrimination, such as disability or poverty, but did not presume these effects for individuals with certain characteristics. 49 C.F.R. § 26.67(d); 13 C.F.R. § 1008(e)(2). The difference in the burden of proof reflects a congressional judgment about the severity and pervasiveness of discrimination against various groups in transportation-related construction and the likely effect of this discrimination in discouraging contracting opportunities.

D. The Presumption Applies To Groups Found By Congress To Have Been Harmed By Discrimination.

Petitioner argues that the presumption is unconstitutionally over-broad because of its "'random inclusion'" of groups which "'may never have suffered from discrimination in the construction industry.'" Pet.'s Br. at 43 (citing *Croson*, 488 U.S. at 506). However, unlike the situation in *Croson* where "[t]here [wa]s *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry," 488 U.S. at 506 (emphasis in original), Congress and DOT had a strong basis

in evidence for concluding that the groups of individuals identified in both the statute and the regulations have suffered discrimination in efforts to enter and compete in transportation-related construction. *See* Section II *supra*. DOT has carried out its responsibility to implement this presumption by promulgating reasonable regulations that identify, in the most practical and least intrusive way, persons within the groups set out in the statute. These regulations also list nationalities that correspond to the groups identified in the statute. *Compare* 15 U.S.C. § 637(d)(3)(C) *with* 13 C.F.R. § 124.103(b) *and* 49 C.F.R. § 26.67(a). Using a person's nationality in this manner is constitutionally permissible as a practical response to the difficulty that may be involved in determining an applicant's race.

VI. DOT REQUIRES THE USE OF RACE- AND GENDER-NEUTRAL ALTERNATIVES BEFORE RACE OR GENDER-CONSCIOUS REMEDIES CAN BE IMPLEMENTED.

Both the DBE and SDB programs require consideration of race- and gender-neutral means before engaging in race- or gender-conscious remedies. The DBE program requires the States to "meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a). These measures include: "unbundling large contracts to make them more accessible to small businesses;" "[p]roviding technical assistance;" placing DBEs and other small contractors on mailing lists for bids; ensuring that prime contractors receive lists of all potential subcontractors; "[i]mplementing a supportive services program to develop and improve immediate and long term business management, record keeping, and financial and accounting capability;" "[e]stablishing a program to assist new, start-up firms;" and assisting small companies in "develop[ing] their capability to utilize emerging technology [to] conduct business through electronic media." *Id.* § 26.51(b)(1)-(9). In addition, the regulations set forth a number of race-neutral

remedies that are designed to address the historical discrimination practiced by the lending and bonding industries. *See id.* § 26.51(b)(2) (discussing, *inter alia*, "simplifying the bonding process" and "reducing bonding requirements"); *see also id.* § 26.29 (ensuring "prompt payment" to subcontractors).

Similarly, the SDB regulations assume "that agencies will continue such outreach and technical assistance efforts at all times, so that race-conscious measures will be used only to the minimum extent necessary to achieve legitimate objectives." 61 Fed. Reg. at 26048-49 (listing a number of potential race-neutral programs, such as a surety bond program for small contractors, continued efforts to eliminate the impact of surety costs from bids, expanded mentor-protégé programs, and the cessation of "any practices that disproportionately affect opportunities for SDBs and do not serve a valid and substantial procurement purpose"). As the Executive Branch has stated, it intends that "[t]he maximum use of such race neutral efforts will reduce to a minimum the use of race-conscious measures...." *Id.* at 26049.

Although these measures are not expressly defined as "gender-neutral," they are intended to benefit all small businesses, regardless of the race or gender of their owners.

VII. THE PROGRAMS LAST NO LONGER THAN NECESSARY.

It is undisputed that the statutory provisions Petitioner challenges will automatically expire in 2004 unless Congress determines that it is necessary to reauthorize them. *See* Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 1101(a), 112 Stat. 107, 111 (1998) ("TEA-21"). Thus, as in *Fullilove*, "[i]t will be necessary for Congress to re-examine the need for a race-conscious remedy before it extends or re-enacts" the statute. 448 U.S. at 513 (Powell, J., concurring) (also noting the importance of a "temporary...remedy [which] ensures that a race-conscious program will not last longer than the discriminatory effects it was designed to eliminate"). As the

record demonstrates, both Congress and the Executive Branch have undertaken substantial reviews of the need for these programs and the appropriateness of their provisions. Indeed, as a result of this ongoing review process, the current versions of the statutes and regulations are not the same ones first challenged over twelve years ago. They have undergone significant changes, in large part to comport with constitutional requirements.

Under the current SDB and DBE regulations, a qualified business can only be certified as disadvantaged for a period of three years, 49 C.F.R. § 26.83(h); 13 C.F.R. § 124.1014(a), and these firms must demonstrate on a periodic basis that they remain qualified to participate in the program. 49 C.F.R. § 26.83(j); *see also* 13 C.F.R. § 124.1016(b) (requiring an SDB to "report within 10 days... any changes in ownership and control or any other circumstances which could adversely effect its eligibility as an SDB"). Although a business can apply to be re-certified as a DBE or SDB, it must again show that it meets all of the eligibility criteria. 49 C.F.R. § 26.83; 13 C.F.R. § 124.1014(c).

VIII. THE ASPIRATIONAL GOALS ARE NARROWLY TAILORED.

As we have argued, Petitioner has no standing to challenge the goals employed by the SDB and DBE programs to increase contracting by minority- and women-owned firms. *See* Note 2 *supra*. However, should the Court reach the matter, it is important to note that these flexible, aspirational goals have nothing in common with the "rigid racial quota" struck down in *Croson*, 488 U.S. at 499. First, they are not mandatory. 49 C.F.R. § 26.41; 48 C.F.R. § 19.705-4. They are also subject to periodic adjustment, specifically tailored to each geographical region where they apply, and have no application at all in cases where there are no demonstrated effects of discrimination. 49 C.F.R. § 26.45; 64 Fed. Reg. 52806, 52807 (Sept. 30, 1999).

DOT has implemented its SDB program in conformity with the congressional policy codified in the Small Business Act, which sets a "[g]overnment-wide goal

for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). While this aspirational goal applies to the entire executive branch, DOT's goal is established only after the Secretary of Transportation consults with the Small Business Administration in order to ensure that the target number "realistically reflect[s] the potential of...small business concerns owned and operated by socially and economically disadvantaged individuals...to perform such contracts...and subcontracts...." *Id.* § 644(g)(2). There is no statutory or regulatory provision requiring DOT to meet this goal.

The DBE goal is derived from TEA-21, in which Congress established a 10 percent goal for the participation of minorities and women in all federally funded contracting. Pub. L. 105-178, § 1101(b)(1), 112 Stat. 107, 113 ("Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts available for any program...shall be expended with small business concerns owned and operated by socially and economically disadvantaged individuals."). This goal is also an "aspirational" one which can be adjusted upwards or downwards depending upon the circumstances. 49 C.F.R. §§ 26.41, 26.43.

In using grants funds pursuant to this program, the States are specifically instructed that they may not blindly embrace the 10 percent figure as their own goal. 49 C.F.R. §§ 26.41(b), 26.45(b). Instead, a State's "overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses [which are] ready, willing and able to participate on...DOT assisted contracts...." 49 C.F.R. § 26.45(b). "The goal must reflect [the State's] determination of the level of DBE participation [that the State] would expect absent the effects of discrimination." *Id.* DOT has provided the States with a

great deal of guidance as to how this goal should be calculated.

Each State must "determin[e] a base figure for the relative availability of DBEs," through any number of approved ways, including the use of DBE directories and census data, bidders lists, disparity studies, or any other methodology which is "based on demonstrable evidence of local market conditions and...designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in [the relevant] market." 49 C.F.R. § 26.45(c)(1)-(5). DOT has provided the States with ample direction on how to use these various methods. *See, e.g.*, 49 C.F.R. § 26.45; *see also* 64 Fed. Reg. at 5109-12.

Once a State has calculated its baseline figure, it "must [then] examine all of the evidence available in [its] jurisdiction to determine what adjustment, if any, is needed ...in order to arrive at [the] overall goal." 49 C.F.R. § 26.45(d). When making this adjustment, the State should take into account a variety of factors, including "[t]he current capacity of DBEs to perform work in [the] DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years," "[e]vidence from disparity studies...to the extent that it is not already accounted for in [the] base figure," and "evidence from related fields that affect the opportunities for DBEs to form, grow and compete," such as "[s]tatistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in [the] program." *Id.* § 26.45(d)(1)-(2). While the States are also allowed to "make an adjustment to [their] base figure to account for the continuing effects of past discrimination...or the effects of an ongoing DBE program, th[is] adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* § 26.45(d)(3).

Moreover, the regulations allow the States to use contract goals to meet only that portion of their overall goal which they cannot achieve through race- and gender-neutral

means, 49 C.F.R. § 26.51(e), and provide that race- and gender-conscious contracting goals should not be used if the State can achieve all of its goal through race- and gender-neutral means. 49 C.F.R. § 26.51(d)-(f). Furthermore, a State "must reduce or eliminate the use of [its] contract goals" when it "determine[s] that [it] will exceed its overall goal" given the means already employed. *Id.* § 26.51(f)(2); *see also id.* § 26.51(f)(4) (directing the States to "reduce [their] use of contract goals proportionately" when they exceed their overall goals). In fact, when a State "meets or exceeds [its] overall goals for two consecutive years" solely through the use of race-neutral means, then the State need "not set any contract goals on any contracts in the next year." *Id.* § 26.51(f)(3). Instead, the State may simply "continue using only race-neutral means to meet [its] overall goals...." *Id.* A more narrowly tailored process is difficult to envision.

IX. THE PROVISIONS GOVERNING THE GEOGRAPHICAL SCOPE OF THE PROGRAMS ARE NARROWLY TAILORED.

Petitioner also lacks standing to challenge a large number of the contractual provisions which comprise the SDB and DBE programs. *See* Note 2 *supra*. However, should the Court reach the matter, both the SDB and the DBE programs contain regulations which limit the geographic applicability of their race-conscious measures to only those areas where there is current evidence of discrimination. *See* 61 Fed. Reg. at 26045-48; *see also* 49 C.F.R. § 26.45(b). The geographic scope of the SDB program is determined by "benchmarking," a statistical "methodology...designed to ensure that [the benefits of the SDB program] are narrowly tailored to remedy discrimination." 63 Fed. Reg. 35716, 35716 (June 30, 1998). Benchmarking "measures gaps in contracting awards to SDBs that are unrelated to size and age differences with non-SDBs." *Id.* at 35718 n.10. Furthermore, the benchmarking analysis is reviewed annually to determine if any revisions are required and readjusted every three

years, 64 Fed. Reg. at 52806, so that the Government may continually tailor the race-conscious aspects of the program to the specific needs of each region.

Benchmarking thus ensures that the provisions of the SDB program Petitioner challenges will be employed only "when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination." 61 Fed. Reg. at 26049. Based on the current benchmarking analysis, none of the race-conscious aspects of the SDB program for transportation-related construction contracts are available in regions making up forty-two states, including Petitioner's state of Colorado. *See* 64 Fed. Reg. at 52807. The race-conscious aspects of the SDB program in this industry are currently limited to eight states located primarily in the Mid-South, where the Government has concluded that disadvantaged businesses are being significantly under-utilized given their overall concentration in the marketplace. *See* 63 Fed. Reg. at 35718; *see also* 64 Fed. Reg. at 52807.

Thus, Petitioner is challenging the constitutionality of provisions that have never been applied to it, which are not currently in effect in its area of operation, and which will not be applied to it in the future unless the Executive Branch concludes that minority firms are being used so far below their market capacity in the Rocky Mountain region that remedial efforts are warranted. Far from undermining the evidentiary basis for the compelling interest in remedying discrimination, as Petitioner suggests, the benchmarking studies show that DOT's efforts are narrowly tailored to regions of the country where the effects of discrimination have been demonstrated.[7]

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[7] In any event, Petitioner has introduced no evidence challenging the methodology employed by the Executive Branch in making its benchmark determinations. The issue was not presented to the District Court in 1996 since the Government had only just commissioned the program. 61 Fed. Reg. at 26045-47. Nor did Petitioner raise the issue with the Tenth Circuit, even though the first benchmarking reports were prepared long before the Court of Appeals issued its written decision. *Compare Adarand III*, 228 F.3d 1147 (Sept. 25, 2000) *with* 63 Fed. Reg. 35713 (June 30, 1998) *and* 64 Fed. Reg. 52806 (Sept. 30, 1999).

DOT regulations for the DBE program impose analogous requirements upon the recipients of federal funds, obligating them to analyze thoroughly the market conditions in their locality in order to set an aspirational goal which accurately reflects the number of "ready, willing and able DBEs" in the region. 49 C.F.R. § 26.45(b). As previously explained, these regulations limit the geographic scope of the DBE program to only those areas where there is "demonstrable evidence" of current discrimination. 49 C.F.R. § 26.45(b). The DBE regulations clearly contemplate that state and local governments will not employ race- or gender-conscious measures in their areas if there are no measurable disparities attributable to discrimination there. 49 C.F.R. §§ 26.45, 26.51.

More importantly, the geographical limitations imposed by both the SDB and DBE programs further tailor the use of the presumption of disadvantage. Specifically, the challenged regulations limit the use of race- or gender-conscious measures to only those geographical areas where there is a measurable disparity in current government contracting awards that can be attributed to discrimination. 61 Fed. Reg. at 26045-48; 49 C.F.R. § 26.45(b). By definition, it is precisely those firms which have been certified as SDBs and DBEs in these areas that will have experienced the effects of these discriminatory practices. Thus, the regulations ensure that only those firms which are currently suffering from discrimination will benefit from the race-conscious measures at issue. The only way to further narrowly tailor these programs would be by conducting an individualized inquiry into the discrimination suffered by every applicant, which is something that strict scrutiny does not require. *Cf. Wygant*, 476 U.S. at 287 (O'Connor, J., concurring) (noting that "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'").

X. PETITIONER HAS NOT CHALLENGED THE GENDER-BASED CLASSIFICATION IN THE STATUTES OR REGULATIONS WHICH, IN ANY EVENT, SATISFY BOTH STRICT AND INTERMEDIATE SCRUTINY.

The gender-conscious provisions in the DBE program are based on a statutory provision that was originally enacted in 1988, re-enacted in 1991, and most recently re-enacted in 1998.[8] In contrast, Petitioner has challenged select portions of the Small Business Act and related regulations which set forth race-conscious measures for remedying discriminatory practices within the construction industry. *See Adarand*, 515 U.S. at 206-08. Consequently, if this Court finds a constitutional defect in any of those statutes or regulations, it should note that "this case concerns only classifications based explicitly on race." *Adarand I*, 515 U.S. at 213. Petitioner has repeated this position throughout this litigation: on summary judgment proceedings before the District Court and on appeal before the Tenth Circuit. *See* Lodging at 6-7, 9-10. Indeed, in its amended complaint, Petitioner specifically alleges that it "cannot be certified as a DBE because of the race and nationality of its operator" and, therefore, asks for an order "permanently enjoining Defendants from discriminating in the future on the basis of race or national origin in the administration of federal highway contracts in the State of Colorado." *Id.* at 2-4.

As a result, no party presented any evidence or argument on the issue of gender-based classifications to the District Court or the Tenth Circuit. In fact, the Court of Appeals found that Petitioner "has not shown standing to challenge 'the provisions of the SCC program pertaining to women-owned business enterprises (WBE).'" *Adarand III*, 228 F.3d at 1159 (referring to its earlier opinion employing

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[8] *See* Surface Transp. and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 ("STURAA"); Intermodal Surface Transp. Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 ("ISTEA"); *see also* TEA-21, Pub. L. 105-178, 112 Stat. 107 (1998).

intermediate scrutiny) (citation omitted). Petitioner has never challenged this finding in this litigation and did not even raise the issue in its petition for a writ of certiorai. Consequently, the Women Amici respectfully request that the Court limit its ruling to only the race-based measures which have been challenged in this lawsuit and decline any invitation to review the gender-conscious remedies of the DBE program.

"The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left behind is fully operative as a law.'" *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976)); *Champlin Ref. Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234-35 (1932); *accord Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 n.15 (1985) (same) (citing same).

The legislative history of the DBE program demonstrates that Congress conducted an independent analysis of gender and race discrimination within the transportation-related (including airport, highway, and transit) construction industry. For example, although the DBE program was first enacted in 1982, women were not added to the program until 1987. *See, e.g.*, H.R. Rep. No. 100-736, at 21-22; 134 Cong. Rec. 27816-21 (Oct. 3, 1988). Furthermore, in order to properly evaluate the disparity of opportunities for DBE contractors, the government separately tracks minority and women transportation-related contract awards. *See, e.g.*, TEA-21, Pub. L. 105-178, § 1101(b)(6), 112 Stat. 107, 114 (1998); 49 C.F.R. § 26.45. In fact, Congress considered different studies and evidence when evaluating the level of gender discrimination within the transportation industry. *Compare* 61 Fed. Reg. at 26051-52 n.12 *with New Economic Realities*, 100th Cong., at 3-158. Thus, it is clear that Congress was acting

independently when it enacted the gender-conscious measures of the DBE program.

However, should this Court decide to review these gender-based classifications, it should employ intermediate scrutiny. *See, e.g., Nguyen*, 121 S. Ct. at 2059 (citing *VMI*, 518 U.S. at 533). Under this test, the government must have an "exceedingly persuasive" justification for its gender-based classification. *VMI*, 518 U.S. at 533. In other words, the classification must "at least serve[] important governmental objectives" in a manner which is "substantially related to the achievement of those objectives." *Nguyen*, 121 S. Ct. at 2059 (citation and internal quotation marks omitted). By definition, this burden is less demanding than the one applied in challenges to race-conscious provisions. *See, e.g., VMI*, 518 U.S. at 573-74 (Scalia, J., dissenting).

Remedying gender discrimination within the transportation industry is an important governmental objective. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623-24 (1984) (finding a "compelling interest" of the "highest order" in "eradicating discrimination against its female citizens" when upholding a state statute that prohibited gender discrimination in places of public accommodation). In enacting and re-enacting the gender-conscious provisions of the DBE program, Congress analyzed various disparity studies, held numerous hearings and debates on the matter, and consulted with both the public and private sectors. *See, e.g., New Economic Realities*, 100th Cong. at 3-158; H.R. Rep. No. 100-955, at 9-17; 134 Cong. Rec. 27816-21 (Oct. 3, 1988); *see also* Section II *supra*. Most notably, Congress found that women-owned firms have historically been locked out of government contracting opportunities by an existing "good old boy" network, have traditionally earned half of the contracting dollars their male counterparts receive, and have faced far greater difficulty obtaining financing. *See* H.R. Rep. No. 100-955, at 9-17; *see also* Section II *supra*. Thus, Congress and DOT had a sufficient basis in evidence for concluding

that gender-conscious relief was necessary to remedy the ongoing effects of gender discrimination in this area.

In addition, the DBE program's gender-conscious measures are "substantially related to the achievement" of their objective. The direct implementation of this assistance will remedy the "resulting economic disparity" and provide a more competitive playing field for women-owned small businesses in the transportation arena. *Cf. Califano v. Webster*, 430 U.S. 313, 318 (1977); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). Thus, Congress' dissimilar treatment of women in the DBE program was not an "'accidental byproduct of a traditional way of thinking about [women],' but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." *See Webster*, 430 U.S. at 320 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)).

Moreover, when enacting these provisions, Congress first considered gender-neutral alternatives. Specifically, Congress was aware that women-owned businesses—like minority firms—were still receiving a disproportionately small share of government contract awards despite prior anti-discrimination legislation and numerous programs available to all small businesses under the Small Business Act. *See, e.g.*, H.R. Rep. No. 100-736 at 9, 16-22, 31, 59-61 (noting that while women-owned firms comprised nearly one-third of all small businesses during the 1980s, they typically received less than 1 percent of all federal contracting dollars); *see also* 15 U.S.C. § 631(h) (making general findings of gender discrimination against women-owned firms). It was for these reasons that Congress established aspirational contracting goals for these firms and, ultimately, determined that women-owned business—like minority firms—should be presumed disadvantaged for the purposes of the DBE program. *See, e.g.*, 134 Cong. Rec. 27816-21; H.R. Rep. No. 100-736, at 21-22.

More importantly, when Congress most recently considered the issue, it knew that the market itself does not operate in a gender-neutral fashion and, thus, that there was

a continuing need for the DBE program *See* Section IV *supra*. In addition, the States are currently required to first implement measures which have race- and gender-neutral effects before resorting to gender-conscious relief. *See* Section VI *supra*. Finally, the goals which are set for achieving these measures are purely "aspirational." *See* Section VIII *supra*. While the States are required to make "good faith" efforts to achieve these goals, there is no penalty for failing to achieve a particular result. *Id.* Also, the gender-conscious provisions of the DBE program are subject to all of the same limitations and qualifications as the program's race-conscious provisions, which guarantee that the these remedial measures are employed only in those regions where there is demonstrable evidence of gender discrimination and, then, no longer than necessary to remedy this problem. *See* Section IX *supra*.

CONCLUSION

For reasons explained above, the Women Amici respectfully urge this Court to hold that the statutes and regulations underlying the SDB and DBE programs are constitutional. If the Court determines that one or more race-conscious provisions of these programs are invalid, the Women Amici respectfully request that the Court limit its holding expressly to those provisions.

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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL, INC., AND LATIN AMERICAN MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONGRESS HAD A COMPELLING INTEREST IN RE-ENACTING THE DBE PROGRAM AS A REMEDY FOR RACIAL DISCRIMINATION WITHIN THE NATION'S CONSTRUCTION INDUSTRY 4

A. Congress' Findings of Racial Discrimination Are Entitled to Considerable Deference 6

B. Section Five of the Fourteenth Amendment Affords Congress Broad and Unique Powers to Remedy the Effects of Racial Discrimination 8

C. Congress Reasonably Concluded That the Effects of Racial Discrimination Remain Prevalent in the Nation's Construction Industry. 12

1. Entry-Level Discrimination 12

2. Ongoing Marketplace Discrimination Confronting Established Minority Contractors 15

TABLE OF CONTENTS
(continued)

Page(s)

3. Petitioner Offers No Basis for Overturning the Concurrent Findings of the Courts Below That Congress Acted in Furtherance of a Compelling Governmental Interest 18

II. THE REVISED DBE PROGRAM IS NARROWLY TAILORED TO SERVE CONGRESS' COMPELLING INTEREST IN REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION 21

A. Race Is Merely One of Several Factors Determining Who Will Be Awarded a Particular Contract 21

B. The DBE Program Is Narrowly Tailored to Remedy Ongoing Effects of Identified Forms of Discrimination in the Construction Industry 26

1. The DBE Program in Part Remedies Effects of Entry Level Discrimination 26

2. The DBE Program, in Part, Remedies the Effects of Various Forms of Discrimination in the Construction Industry 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)..... *passim*
City of Boerne v. Flores,
521 U.S. 507 (1997).....9
City of Erie v. PAP's A.M.,
529 U.S. 277 (2000).....12
City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989)..... *passim*
Concrete Works of Colorado, Inc. v.City and County of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000)..... 20
Ex Parte Virginia,
100 U.S. 339 (1880).....11
FEC v. National Right to Work Committee,
459 U.S. 197 (1982).....8, 9
Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976).....30
Fullilove v. Klutznick,
448 U.S. 448 (1980)..... passim
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).....26
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).....22
Katzenbach v. Morgan,
384 U.S. 641 (1966).....9
Local 28, Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986).....10, 25
Metropolitan Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990).....7, 10
Nixon v. Shrink Missouri Government PAC,
528 U.S. 377 (2000).....13

TABLE OF AUTHORITIES
(continued)

Page(s)

Oregon v. Mitchell,
400 U.S. 112 (1970).....22, 24
Regents of the University of Calif. v. Bakke,
438 U.S. 265 (1978).....24
South Carolina v. Katzenbach,
383 U.S. 301 (1966).....29
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).....10, 25
Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997).....8
United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).....10
United States v. Paradise,
480 U.S. 149 (1987).....10
United Steelworkers of America v. Weber,
443 U.S. 193 (1979).....15

REGULATIONS

49 C.F.R. § 26.45.....24, 26
49 C.F.R. § 26.51(a).....26
49 C.F.R. § 26.53(a)(2).....27
49 C.F.R. § 26.67(d).....28
49 C.F.R. § 26.51(d).....26
49 C.F.R. § 26.51(e)(2).....26, 27
49 C.F.R. § 26.67(a)(1).....29
49 C.F.R. § 26.67(a)(2).....29
49 C.F.R. § 26.67(b)(1), (4).....29
49 C.F.R. § 26.87.....29
49 C.F.R. Pt. 26, App.
§ I.....28
§ IV(D)(2).....27

TABLE OF AUTHORITIES
(continued)

Page(s)

§ IV(E).....27

STATUTES

Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 113 13

Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116.....5, 6

MISCELLANEOUS

The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,050 (1996)..... *passium*

Herbert Hill, Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action, Univ. of Wisconsin-Madison Journal of Intergroup Relations, Vol. XII, No. 4 (1984) *13*

INTEREST OF THE *AMICI CURIAE*

Amici are nonprofit organizations devoted to helping minority-owned businesses participate fully in the mainstream of American economic life. As courts and legislatures throughout the country have found, a long-standing pattern and practice of racial discrimination by unions, trade associations, banks, bonding companies, and government agencies has greatly hindered the formation and success of minority-owned businesses and continues to do so today. Many of the minority-owned businesses *amici* represent have benefited from programs instituted at the federal, state, and local levels to remedy this discrimination. *Amici* strongly believe that such programs are a limited but vital step in reducing the competitive disadvantages minority-owned businesses face as a result of discrimination in the marketplace. Because this Court's decision will have a profound impact on the future viability of hundreds of remedial programs throughout the country, *amici* wish to present their views concerning the constitutionality of the Disadvantaged Business Enterprise ("DBE") program at issue in this case.[1]

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs. MBELDEF has participated as an *amicus curiae* throughout this litigation, in both the District Court and the Tenth Circuit, and filed a brief in *Adarand*

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

Constructors, Inc. v. Pena, 515 U.S. 200 (1995), when this case was first before the Court.

The National Association of Minority Contractors ("NAMC") is a nonprofit corporation founded in 1969. During its 32 years of service, NAMC's goals have been to provide education and training to minority contractors, to promote the economic and legal interests of minority construction firms, and to bring equitable procurement and business opportunities to its members.

The National Minority Supplier Development Council, Inc. ("NMSDC") is a nonprofit corporation founded in 1969 that seeks to provide minority businesses with access to purchasing opportunities in the public and private sectors. Currently, NMSDC has 46 regional offices and a national office that coordinate these efforts on a local and national level.

The Latin American Management Association ("LAMA") is a nonprofit business league founded in 1972. For the past 29 years, LAMA has continuously focused its attention on procuring prime contract opportunities for Hispanic and minority firms at the federal, state, and local levels and has actively promoted minority business opportunity programs.

SUMMARY OF ARGUMENT

When Congress acts to remedy racial discrimination, it stands on special constitutional footing. This is the clear import of Section Five of the Fourteenth Amendment, which expressly authorizes Congress "to enforce" the Amendment "by appropriate legislation." U.S. Const. amend. XIV, § 5. This enforcement power includes not just the authority to adopt laws prohibiting invidious discrimination, but also "the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion).

Congress' Section Five power does not, of course, exempt federal laws from the stringent constitutional review applied to racial classifications generally. As the Court's first decision in this case made clear, race-conscious laws are subject to strict scrutiny irrespective of whether they spring from the exercise of federal or state power. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Accordingly, Congress, like its state and local counterparts, may draw racial classifications only if they are narrowly tailored to serve a compelling governmental interest. *Id.* In applying this standard to a race-conscious federal law enacted under Section Five, however, the Court must give "great weight" to Congress' judgment that the law is needed to redress racial discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion). For there can be no question that remedying the effects of racial discrimination constitutes a compelling governmental interest, *see Adarand*, 515 U.S. at 237, and such remedial efforts lie at the heart of Congress' power under Section Five. To subject congressional findings of discrimination and the need for remedial action to an overly "stringent standard of review would impinge upon Congress' ability to address problems of discrimination." *Fullilove*, 448 U.S. at 503 n.4 (Powell, J., concurring).

In order to respect Congress' Section Five power while subjecting its enactments to the "detailed judicial inquiry" required for race-based classifications, *Adarand*, 515 U.S. at 229, the Court should hold that "a reasonable congressional finding of discrimination" is sufficient to satisfy the compelling-interest prong of strict scrutiny. *See Fullilove*, 448 U.S. at 503 n.4 (Powell, J., concurring). This standard is plainly met here. When Congress re-enacted the Disadvantaged Business Enterprise ("DBE") program in 1998, the evidence before it demonstrated that decades of antidiscrimination law enforcement had failed to rid the construction industry of racial discrimination. Congress

chose to continue its race-conscious remedial efforts, and it had ample basis for doing so.

Nor can there be any question that the DBE program is narrowly tailored. The DBE program does not establish a quota or any other one-size-fits-all remedy in which race is the "sole criterion" in the allocation of public-sector construction contracts. *Cf. Croson*, 488 U.S. at 493. To the contrary, the DBE program establishes a limited and flexible remedial scheme, one that takes into account the particular circumstances surrounding individual public contracts. The program sets only aspirational goals for minority business participation, and requires recipients of federal funds to set market-sensitive participation goals. If recipients fail to meet these goals, no penalty attaches. Indeed, recipients may not even consider race until they have exhausted all race-neutral means of increasing DBE participation.

When it first considered petitioner's challenge to the DBE program, this Court took pains to "dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (citation and internal quotation marks omitted). The DBE program is a modest and flexible effort to remedy a problem for which Congress had abundant evidence. If the Court's characterization of strict scrutiny is to have any meaning, and if Congress' Section Five power is to have any force in this context, the DBE program must be upheld.

ARGUMENT

I. CONGRESS HAD A COMPELLING INTEREST IN RE-ENACTING THE DBE PROGRAM AS A REMEDY FOR RACIAL DISCRIMINATION WITHIN THE NATION'S CONSTRUCTION INDUSTRY.

Two decades ago, this Court determined, in the same factual context involved here, that Congress had sufficient evidence of racial discrimination in the Nation's construction

industry to conclude that race-conscious remedial action was warranted. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court examined in detail the legislative record supporting passage of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, which required that 10% of the funds appropriated for local public works projects be used to purchase goods or services from minority-owned businesses. The Court found that "Congress had before it . . . evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises." *Id.* at 478 (plurality opinion); *see id.* at 520 (Marshall, J., concurring in judgment). This disparity, the evidence showed, "result[ed] not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination." *Id* at 478 (plurality opinion). Although much of the evidence in the legislative record pertained to federal procurement contracting, the Court also found that "there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well." *Id* The Court therefore held that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," and that race-conscious remedial measures were therefore permissible. *Id.*; *see id.* at 520 (Marshall, J., concurring in judgment).

Congress relied on the same history of discrimination in public-sector contracting, and the same interest in remedying the effects of that discrimination, when it re-enacted the DBE program in 1998, as well as extensive new evidence that has emerged in the two decades following *Fullilove*. For three reasons, this evidence is more than adequate to show that Congress acted in furtherance of a compelling governmental interest here. First, the Court's subsequent decision in

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), left undisturbed *Fullilove*'s analysis of the legislative record before Congress, in the course of which the Court accorded considerable weight to Congress' findings of racial discrimination in the construction industry. Second, *Fullilove*'s teaching that congressional findings are entitled to considerable weight finds strong support in Section Five of the Fourteenth Amendment. Finally, the evidence before Congress in 1998 demonstrated that racial discrimination in the construction industry remains sufficiently pervasive to justify continued use of race-conscious remedial action.

A. Congress' Findings of Racial Discrimination Are Entitled to Considerable Deference.

This Court's decision in *Adarand* decided a narrow legal question, albeit one with broad import: whether the federal government's use of racial classifications, even for concededly benign purposes, must be subjected to strict scrutiny. The Court held that race-conscious laws enacted by the federal government, like those enacted by state and local governments, must be analyzed under strict scrutiny and thus are constitutional "only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. The Court expressly overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had held that "'benign' federal racial classifications need only satisfy intermediate scrutiny." *Adarand*, 515 U.S. at 225, 227.

The Court notably did not purport to overrule *Fullilove*, nor, in light of the Court's holding in *Adarand*, was there any basis for doing so. Although the plurality in *Fullilove* declined to adopt either strict or intermediate scrutiny as the appropriate standard of review, it expressly stated that the federal race-conscious legislation at issue there "would survive judicial review under either 'test.'" 448 U.S. at 492. And, as the Court noted in *Adarand*, Justice Powell, who

joined the plurality opinion, "express[ed] his view that the plurality had essentially applied 'strict scrutiny.'" 515 U.S. at 219. It is true that the three Justices who concurred in the judgment in *Fullilove* (Justice Marshall, joined by Justices Brennan and Blackmun), upheld the 10% set-aside under intermediate scrutiny, since they viewed remedying the "present effects of past racial discrimination [as] a sufficiently important governmental interest to justify the use of racial classifications." *Fullilove*, 448 U.S. at 520 (Marshall, J., concurring in judgment). But this Court has long held, and indeed reaffirmed in *Adarand*, 515 U.S. at 237, that remedying the effects of racial discrimination constitutes not merely an important but a *compelling* governmental interest. Thus, the only sense in which *Adarand* might have required a different analysis from that applied in *Fullilove* concerns the tightness of the "fit" between means and end that the three Justices who concurred in the judgment demanded. The Court left undisturbed *Fullilove*'s analysis of the congressional findings that supported use of the 10% set-aside as a remedy for racial discrimination within the Nation's construction industry.

As *Fullilove* makes clear, Congress' decision to take race-conscious remedial action is entitled to considerable weight. In gauging whether Congress' action furthers a compelling governmental interest, the Court must determine whether Congress "reasonably concluded" that the practice and lingering effects of racial discrimination in a given industry are still prevalent. *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). As Justice Powell noted, "a reasonable congressional finding of discrimination" is sufficient under strict scrutiny, because any "more stringent standard of review would impinge upon Congress' ability to address problems of discrimination." *Id.* at 503 n.4. This standard is consistent with the Court's approach to review of congressional findings in other contexts. For example, in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180

(1997), the Court held that even when First Amendment rights are implicated, the Constitution "gives to Congress the role of weighing conflicting evidence in the legislative process," and thus congressional findings are owed "considerable deference." *Id.* at 199-200. And, in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982), the Court rejected a First Amendment challenge to a campaign-finance statute, stating that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210.

B. Section Five of the Fourteenth Amendment Affords Congress Broad and Unique Powers to Remedy the Effects of Racial Discrimination.

Fullilove's standard of review for congressional findings of discrimination is supported not only by the weight accorded Congress' findings of fact in general, but also by the "unique remedial powers" conferred on Congress by Section Five of the Fourteenth Amendment. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (plurality opinion). Section Five, this Court has held, "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). That power encompasses the discretion to implement race-conscious measures when Congress concludes that such measures are "reasonably necessary to the redress of identified discrimination." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring). Thus, just as Congress' determination that discrimination exists is entitled to substantial weight, so too is its judgment that broad prohibitions on the practice of racial discrimination have proved insufficient to ameliorate the lingering effects of such discrimination. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that Congress is "entitled to much deference" when it concludes that legislation is needed to safeguard Fourteenth Amendment guarantees).

The "considerable latitude" Congress enjoys when exercising its Section Five powers, *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting), is even broader than the discretion federal courts possess when fashioning decrees to remedy racial discrimination. Yet this Court has upheld judicially imposed remedies far more race-conscious than the congressionally enacted DBE program at issue here. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), for example, the Court affirmed a decree mandating student reassignment and busing solely on the basis of race as a means of achieving greater racial balance in a still-segregated school system. *See also United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) (mandating a fixed ratio of black and white teachers at each school as a remedy for past discrimination). The Court has also upheld similarly race-conscious court orders as a means of integrating unions and workplaces that excluded minorities in violation of Title VII. *See United States v. Paradise*, 480 U.S. 149, 153, 167 (1987) (plurality opinion) (upholding temporary, court-imposed "one-black-for-one-white" promotion requirement); *id.* at 189 (Stevens, J., concurring in judgment); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 474 (1986) (plurality opinion) (upholding court-ordered requirement that minorities comprise 29% of union's membership by certain date); *id.* at 483 (Powell, J., concurring in part and concurring in judgment).

The Court concluded in these cases that merely prohibiting the practice of racial discrimination had not proved sufficient to remedy the effects of past discrimination, and that judicial imposition of affirmative race-conscious relief was therefore warranted. Congress possesses even broader power to make such judgments under Section Five of the Fourteenth Amendment. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress,

expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483 (plurality opinion).

Affording deference to congressional findings of discrimination is in no way inconsistent with *Adarand*'s extension of strict scrutiny to federal race-conscious measures. Congress has a "unique constitutional role" in finding and remedying racial discrimination, *Fullilove*, 448 U.S. at 516 (Powell, J., concurring), and its laws are not properly subject to the kind of second-guessing applied to legislative findings made by state legislatures, *cf. Croson*, 488 U.S. at 490-93 (plurality opinion). That is because Congress, "unlike a State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. State and local laws that rely on racial classifications presumptively conflict with Section One of the Fourteenth Amendment, whose very ratification "stemmed from a distrust of state legislative enactments based on race." *Id.* at 491. Section Five, in contrast, affirmatively grants Congress *authority* to enact race-conscious measures when such measures are necessary to remedy the effects of racial discrimination. *See Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (explaining that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress").

In holding that federal and state race-conscious measures are both subject to strict scrutiny, *Adarand* neither repudiated the constitutionally inscribed difference between state and federal legislatures, nor "contravene[d] any principle of appropriate respect for a coequal branch of the Government." *Adarand*, 515 U.S. at 230. For this reason, when Congress acts pursuant to its Section Five powers, as it clearly has here, its findings of discrimination are entitled to greater deference than those made by state and local governments. *See Fullilove*, 448 U.S. at 515 n.14 (Powell, J., concurring) ("The

degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.").

It is all the more proper to defer to congressional findings of discrimination when, as in this case, Congress' chosen remedy is so modest that it plainly satisfies the constitutional requirement of narrow tailoring. *See City of Erie v. PAP's A.M.*, 529 U.S. 277, 311 n.1, 312-13 (2000) (Souter, J., concurring in part and dissenting in part) (explaining that "[a] lesser showing may suffice when the means-end fit is evident to the untutored intuition," and applying this principle to the evidence advanced by the government in support of its asserted interest). Were a legislature to adopt a race-conscious remedy that appears, at first look, far more expansive than necessary to address the identified discrimination, it may be appropriate for a court to question whether the finding of discrimination is truly supportable or is being used as justification for accomplishing a different legislative agenda. In that circumstance, it may make sense to require the legislature to support its conclusion that remedial action is warranted with detailed and specific evidence. *Cf. Croson*, 488 U.S. at 493 (plurality opinion). But where, as here, the legislature adopts a race-conscious remedy that on its face focuses narrowly on the discrimination that has been identified, the actual purpose served by the law is likely to be apparent. In such circumstances, the legislature should be permitted to rely upon less-detailed evidence of discrimination. *Cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

As discussed below (*see* Section II.A, *infra*), the DOT's revised DBE program represents a carefully limited step toward ending racial discrimination in public contracting.

Unlike the program invalidated in *Croson*, the revised DBE program does not make race a dispositive factor in the allocation of public contracts. Rather, the program requires state and local governments to consider race only in a limited and flexible fashion. Because the DBE program on its face is narrowly tailored to the problem of racial discrimination in public contracting, it must be upheld so long as Congress' finding of systemic discrimination was reasonable.

C. Congress Reasonably Concluded That the Effects of Racial Discrimination Remain Prevalent in the Nation's Construction Industry.

The legislative record before Congress in 1998, the year it re-enacted the DBE program at issue here, *see* Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 113, far exceeded the record before Congress in 1977 and demonstrated that the effects of racial discrimination within the Nation's construction industry had dissipated little (if at all) over the preceding two decades. Both the District Court and the Tenth Circuit thoroughly reviewed the evidence before Congress in order to "smoke out" any illegitimate uses of race and found none. Both lower courts instead found ample evidence supporting Congress' conclusion that racially discriminatory barriers continue to exist in construction contracting on numerous fronts, and that limited race-conscious measures are therefore warranted to remedy that discrimination. Petitioner offers no basis for overturning the concurrent findings of the courts below.

1. Entry-Level Discrimination

The evidence before Congress, detailed in dozens of congressional hearings and reports, independent academic studies, and a voluminous Justice Department survey published in the Federal Register as *The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050-26,063 (1996), revealed two fundamental barriers

confronting minority entrepreneurs seeking to establish and build successful contracting businesses. First, minorities have faced a long and well-documented history of discriminatory exclusion from trade unions on the basis of race, which has prevented minorities from developing the technical skills and experience necessary to launch a successful business. *Id.* at 26,054. The exclusionary tactics employed by unions have included discriminatory selection criteria, discriminatory application of admissions requirements, and imposition of conditions (such as requiring new members to be related to an existing member) that effectively barred minorities from employment opportunities in the skilled trades. *Id.* at 26,055. The overwhelming evidence of racial discrimination by unions has led this Court to observe that "judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979).[2] A recent study conducted by a Yale University economist concluded that a history of "blocked access to the skilled trades is the most important explanation of the low numbers of minority and women construction contractors today." *The Compelling Interest*, 61 Fed. Reg. at 26,056 (citing Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989)).

The second principal barrier to the formation and development of minority businesses is the discriminatory denial of access to capital, a subject Congress has explored in depth through numerous hearings over the past ten years. *Id.* at 26,057 & n.86 (citing hearings). Academic studies confirm

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[2] *See* Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, Univ. of Wisconsin-Madison Journal of Intergroup Relations, Vol. XII, No. 4, pp. 21-27 (1984) (describing tactics used by unions to exclude black workers, including establishment of state licensing boards controlled by union representatives that discriminatorily denied licenses to black craftsmen).

the mountain of anecdotal evidence presented at these hearings documenting the discriminatory treatment minority entrepreneurs have received when applying for loans and credit. For example, a study comparing white-owned businesses with black-owned businesses with the same amount of equity capital found that white-owned businesses typically received loan amounts three times larger than those received by their black-owned counterparts. *Id.* at 26,058 (citing Bates, *Commercial Bank Financing of White and Black Owned Small Business Start-ups*, Quarterly Review of Economics and Business, Vol. 31, No. 1, at 79 (1991)). In the construction industry, the disparity was even more pronounced: white-owned firms received *50 times* as many loan dollars as black-owned firms with the same equity. *Id.* (citing Grown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992)).

Studies also show that, among firms with the same borrowing credentials, minority-owned firms are approximately 20% less likely to obtain venture-capital financing than comparable non-minority-owned firms, and 15% less likely to receive business loans. *Id.* A 1996 study in the Denver, Colorado, area, from which this case arises, found that African-Americans were three times more likely than whites to be rejected for business loans, and Hispanics were 1.5 times more likely than whites to be rejected for such loans. *Id.* (citing Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver* at v (1996)). Statistically significant disparities remained even after the authors of the study controlled for factors that might legitimately affect lending decisions, such as size, firm age, creditworthiness, and net worth. *Id.* This compelling body of evidence largely explains why the availability of minority-owned contractors

has been artificially depressed by marketplace discrimination.[3]

2. Ongoing Marketplace Discrimination Confronting Established Minority Contractors

Minority contractors who manage to overcome these obstacles to obtaining the skills and financing necessary to start their own businesses are frequently confronted with discrimination in attempting to bid for, obtain, and perform construction contracts. This ongoing discrimination adversely affects market access and utilization of minority contractors and seriously undermines the ability of minority contractors to compete on an equal basis for contracts. These discriminatory practices have been documented extensively in case law, regional disparity studies, and congressional hearings. *See The Compelling Interest*, 61 Fed. Reg. at 26,059 nn.100-01. Discussed below are a few examples of the forms such discrimination takes in markets throughout the country.

"Good-Old-Boy" Networks. Racial discrimination restricts the opportunities of minority contractors at various points in the bidding and contracting process. For example, much of the information about upcoming job opportunities is spread through informal "old-boy networks" that have deliberately excluded minorities, placing minority-owned businesses at a distinct competitive disadvantage. *The Compelling Interest*, 61 Fed. Reg. at 26,059-26,060 (citing National Economic Research Associates, *Availability and Utilization of Minority and Women Owned Business Enterprises at the Massachusetts Water Resources Authority* 74 (1990) (finding

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[3] Thus, any attempt at measuring the degree and pervasiveness of marketplace discrimination through a gross comparison of current availability to current utilization necessarily underestimates the true magnitude of disparities caused by such discrimination.

that exclusion from established networks makes it more costly for minorities to compete with non-minority-owned firms)).

Unequal Access to Bonding. Minority contractors also face racial discrimination in obtaining bonding, which is often a prerequisite to participating in public-sector construction contracts. State and local studies, as well as extensive anecdotal evidence presented at congressional hearings, have documented the fact that "minority businesses [are] significantly less able to secure bonding on equal terms with white-owned firms with the same experience and credentials." *Id.* at 26,060 & nn.117-20. Such discrimination can seriously undercut the ability of minority contractors to compete with non-minority-owned firms. Even a one or two percent differential in the bonding premiums charged to minority contractors can increase costs substantially and result in the difference between a winning and losing bid.

Bid Shopping. The construction industry has been and remains "a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work." *Id.* at 26,058. This system allows prime contractors to discriminate against minority subcontractors by simply refusing to accept low bids submitted by minority-owned firms, or by "shopping" a low bid submitted by a minority-owned firm to non-minority subcontractors willing to beat the bid. *Id.* at 26,059. Such bid shopping is generally considered unethical in the construction industry, but its use is not uncommon when a prime contractor seeks to replace a low-bidding minority contractor with a favored non-minority contractor. In the numerous disparity studies that have been undertaken by state and local governments over the past decade, there are virtually no documented instances in which minority subcontractors were the beneficiaries of bid shopping.

Price Discrimination by Suppliers. Minority contractors are frequently unable to obtain the same prices and discounts that suppliers offer to non-minority contractors, thereby

raising the costs incurred (and thus the bids submitted) by minority contractors. *The Compelling Interest*, 61 Fed. Reg. at 26,061. Indeed, one regional study found, in an incident illustrative of many others, that a white and minority contractor who had formed a joint venture were given such disparate quotes from the *same* supplier for the *same* project that the price differential would have added 40% to the final contract price had the minority contractor's price been used. *Id.* at 26,061 & n.125 (citing BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-20 (1992)).

Unfair Denial of Opportunity to Bid. It is also common for minority subcontractors to bid on private-sector jobs only to be told by a non-minority contractor that no bids from minority-owned firms were needed because no requirements for DBE participation applied to those contracts. To the extent that minority contractors derive a disproportionate share of their contract dollars from the highly competitive and low profit margin public-works arena, it undoubtedly reflects the daunting obstacles posed by such forms of marketplace discrimination on private construction contracts that remain beyond the reach of government affirmative-action programs.[4]

In addition to the direct evidence of racial discrimination discussed above, the legislative record before Congress contained a wealth of disparity studies conducted after this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Justice Department commissioned an analysis of 39 such studies from localities across the country, which revealed that, on average, minority-owned businesses

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[4] *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F. Supp. 2d 1042, 1074 (D. Colo. 2000) (noting testimony of minority and women contractors in the Denver area who were unable to obtain work on private construction projects due to negative stereotypes held by white male contractors). The city's appeal in the *Concrete Works* case has been held in abeyance by the Tenth Circuit pending the Court's decision in this case.

received only 59 cents for every dollar these firms would be expected to receive based on the number of qualified and available firms. *The Compelling Interest*, 61 Fed. Reg. at 26,061-26,062. Even in the area of construction subcontracting, which had the smallest disparity by industry sector, minority-owned firms received only 87 cents for every dollar they would be expected to receive. *Id.* at 26,062. Perhaps more significant were the studies documenting the effect on minority participation in public-sector contracting in those localities that abruptly ended their affirmative-action programs in the wake of *Croson*. In Philadelphia, for example, contract awards to minority- and women-owned businesses plummeted by 97% after the city discontinued its program in 1990; in Hillsborough County, Florida, awards to minority-owned businesses fell by 99%; and in Tampa, Florida, contract awards to black-owned businesses also dropped by 99%. *Id.* at 26,062 & nn.131-33. These figures graphically illustrate the extent to which minority-owned contractors remain effectively frozen out of public-sector contracting markets absent affirmative remedial measures designed to counteract the racially discriminatory forces otherwise at play.

3. Petitioner Offers No Basis for Overturning the Concurrent Findings of the Courts Below That Congress Acted in Furtherance of a Compelling Governmental Interest.

Petitioner argues here, as it did unsuccessfully below, that the evidence before Congress in 1998 somehow was not specific enough to support Congress' finding of discrimination in the Nation's construction industry. But petitioner's argument ignores the fact that, when Congress legislates in this arena, it need not "compil[e] the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (plurality opinion). Indeed, because Congress typically formulates rules with nationwide application, it is not required to make detailed

state-by-state or city-by-city findings of discrimination, nor could it realistically be expected to do so. "In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part).

Petitioner nonetheless resurrects the plea, rejected in *Fullilove*, that the Court "treat Congress as if it were a lower federal court . . . duty bound to find facts and make conclusions of law." *Fullilove*, 448 U.S. at 502 (Powell, J., concurring). For example, petitioner contends (without legal or scientific support) that Congress may not rely on statistical evidence of discrimination unless the statistical study is limited to contractors who "have the necessary expertise to perform the contracts in question," have met bonding requirements for those hypothetical contracts, and "are not otherwise engaged at the time" the studies are conducted. Pet. Br. 29. The notion that Congress must or even could obtain nationwide statistics on the utilization of minority contractors that take into account each of these factors is ludicrous. Congress is not charged with the task of deciding whether a single employer has engaged in discrimination in hiring, or even whether all employers in a particular locality have done so. When attempting to draw conclusions about the prevalence of discrimination within an industry on a national level, Congress must necessarily rely on statistical evidence at a much higher level of generality. Imposing on Congress the sort of evidentiary "requirements" suggested by petitioner would indeed render strict scrutiny "fatal in fact," in direct conflict with one of the core principles reaffirmed by this Court's first *Adarand* decision. *See* 515 U.S. at 237.

Nor is petitioner's reliance on *Croson* persuasive here. The evidentiary basis for Congress' decision to re-enact the DBE program was far more extensive than the evidentiary record this Court found inadequate in *Croson*. There, the city of

Richmond had before it "*no* direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Croson*, 488 U.S. at 480 (emphasis added). Instead, proponents of the set-aside relied merely on the disparity between the percentage of minorities in the city's general population and the percentage of the city's prime construction contracts that had been awarded to minority-owned businesses over the preceding five years, along with general findings of discrimination within the construction industry on a national level. *Id.* at 479-80. The Court held this evidence insufficient to support the city's set-aside because the legislative record contained neither evidence of racial discrimination specifically tied to the Richmond construction industry, nor evidence of the disparity between the level of participation by minority contractors in public construction projects and the number of minority contractors in the city qualified to undertake such work. *Id.* at 502, 505.

Here, Congress had before it abundant evidence from localities throughout the country demonstrating that racial discrimination remains prevalent in the construction industry. In addition, the record before Congress made clear that the lingering effects of past discrimination pose significant barriers to the ability of minority contractors to compete on a level playing field for public-sector construction contracts. That evidence provided a more than sufficient basis on which Congress could conclude that "the problem was national in scope." *Fullilove*, 448 U.S. at 478 (plurality opinion); *cf. Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding amendments to Voting Rights Act of 1965 that extended ban on literacy tests nationwide). Yet, as discussed in greater detail below, the regulations implementing the DBE program do not rely on inflexible percentages applicable without regard to local market conditions. Indeed, responding to this Court's criticism of the Richmond ordinance in *Croson*, the

regulations expressly require state and local governments to set goals for DBE participation that are directly tied to the number of "ready, willing and able" DBEs in the local market. 49 C.F.R. § 26.45.

II. THE REVISED DBE PROGRAM IS NARROWLY TAILORED TO SERVE CONGRESS' COMPELLING INTEREST IN REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION.

A. Race Is Merely One of Several Factors Determining Who Will Be Awarded a Particular Contract.

The Court's cases indicate that remedial measures in which race is the "sole criterion in an aspect of public decisionmaking" are far more problematic from a narrow-tailoring standpoint than programs in which race is merely one of several factors taken into account. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 508 (1989); *see Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 317-18 (1978) (opinion of Powell, J.). There are of course contexts in which race must play the decisive role in order to remedy the effects of past discrimination, as in the school desegregation cases. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). But in general the Court has viewed such measures skeptically because, at least in contexts where public decisionmaking involves an assessment of individual qualifications, a regime in which race alone is determinative (e.g., quotas) may force the decisionmaker to choose individuals who would not otherwise be deemed qualified. *See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495-96 (1986) (O'Connor, J., concurring in part and dissenting in part). Conversely, programs or decrees in which race is not the dispositive factor have been viewed more favorably, because they permit a sufficiently individualized inquiry into the respective qualifications of each individual applicant. *See, e.g., Bakke*, 438 U.S. at 315-18 (opinion of

Powell, J.); *cf. Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 636-37 (1987) (gender).

The DOT's revised DBE program does not result in the allocation of public-sector construction contracts based solely (or even predominantly) on race. Unlike the ordinance invalidated in *Croson*, which allocated 30% of the funds of each contract to subcontractors from specified racial groups, 488 U.S. at 477, the DOT's program merely sets a nationwide goal that 10% of federal funds be used to purchase goods and services provided by disadvantaged business enterprises. This aspirational goal is not itself a racial classification at all (since it is based on disadvantage) and thus is subject to no more than rational basis review. *See Adarand*, 515 U.S. at 212-13.

But even if the program simply used disadvantage as a direct proxy for race (which, as will be seen below, it does not), the program would still not employ race as the sole criterion for deciding which contractor will obtain a particular subcontract. As implemented by the DOT's revised regulations, the 10% national goal is not binding on any state or local recipient of federal funds, or on any prime contractor who seeks to bid on a particular contract. Instead, the DBE program requires state and local recipients of federal funds to set their own goals for DBE participation based on local market conditions -- specifically, on "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts." 49 C.F.R. § 26.45(b). Recipients of DOT funds may not simply rely on the 10% national goal, but must instead set a goal reflecting "the level of DBE participation [the recipient] would expect absent the effects of discrimination." *Id.*

Besides the flexibility provided in the setting of overall program goals, the regulations ensure that work on a particular contract is not allocated "according to inflexible percentages solely based on race or ethnicity." *Fullilove*, 448

U.S. at 473 (plurality opinion). The regulations expressly state that recipients of DOT funds "must meet the maximum possible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a). The regulations permit recipients to use "contract goals" -- i.e., provisions requiring a prime contractor to use DBE subcontractors for a set percentage of the work -- only when the recipient's overall goal of DBE participation cannot be met through race-neutral means. § 26.51(d). And, even when recipients use contract-specific goals, they are not required to set such a goal on every DOT-assisted contract, or to set the goal for a particular contract at the same percentage as the overall goal. § 26.51(e)(2). Instead, the regulations state that recipients must tailor the contract goal to the local market conditions relating to that specific contract: "The goal for a specific contract may be higher or lower than [the] percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract." *Id.*

Finally, even where a contract goal has been set, a prime contractor who submits the lowest bid may not be denied the contract merely because the contractor failed to satisfy the specified level of DBE participation. The regulations state that a recipient of DOT funds "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal," so long as the bidder made good-faith efforts to locate qualified DBEs. 49 C.F.R. § 26.53(a)(2). The regulations make clear that, in making good faith efforts to meet a contract goal, "[p]rime contractors are not . . . required to accept higher quotes from DBEs if the price difference is excessive or unreasonable." 49 C.F.R. Pt. 26, App. A, § IV(D)(2). And a prime contractor is not required to accept an unqualified DBE, so long as the prime contractor has sound reasons for concluding that the DBE is not capable of performing the work in a satisfactory manner. § IV(E).

These provisions, many of which were added specifically to address the narrow-tailoring concerns of this Court's first *Adarand* decision, plainly preclude race from acting as the sole criterion in determining who is awarded a particular government contract. The current DBE program thus stands in marked contrast to the program struck down in *Croson*. There, the city of Richmond imposed what this Court termed a "rigid racial quota," 488 U.S. at 499, which denied non-minority citizens "the opportunity to compete for a fixed percentage of public contracts based solely upon their race," *id.* at 493 (plurality opinion).

As explained above, in determining whether race is the sole criterion used in the public decision-making at issue here, the relevant "decision" is the actual award of a public construction contract, which the DBE program influences by establishing an aspirational goal based on disadvantage, not race. The only aspect of the DBE program that is actually race-conscious involves the presumption of disadvantage granted to certain minority-owned businesses. But, even as to this aspect of the program, individuals are not granted or denied status as DBEs "based solely upon their race." *Croson*, 488 U.S. at 493 (plurality opinion).

This is true for several reasons. First, participation in the DBE program is not limited to those of specified racial backgrounds. Business owners who demonstrate by a preponderance of the evidence that they are both socially and economically disadvantaged may be certified as DBEs, regardless of their race. 49 C.F.R. § 26.67(d). The DOT regulations make clear that, besides race or gender, social disadvantage can stem from any "objective distinguishing feature" (such as disability or long-term residence in rural areas isolated from the mainstream of American society) that has exposed individuals to "cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 49 C.F.R. Pt. 26, App. E, § I.

Members of designated minority groups are presumed to be socially and economically disadvantaged, but that presumption is rebuttable. 49 C.F.R. § 26.67(a). Thus, any person may contest whether a particular minority business owner is in fact socially or economically disadvantaged, and if the certifying agency determines that the minority business owner is not both socially and economically disadvantaged, that individual's firm will be disqualified from participating in the DBE program. § 26.87. Moreover, reliance on the presumption of disadvantage alone is not sufficient to establish eligibility for the DBE program. All minority business owners must submit a signed statement certifying under penalty of perjury that they are in fact socially and economically disadvantaged, § 26.67(a)(1), as well as a signed, notarized statement of net worth, § 26.67(a)(2). If the minority business owner's personal net worth (as defined by the regulations) exceeds $750,000, the presumption of economic disadvantage is rebutted and the individual's firm is not eligible to participate in the DBE program. § 26.67(b)(1), (4). Collectively, these provisions afford a sufficiently individualized inquiry into disadvantage to ensure that use of the presumption does not render the DBE program either over- or under-inclusive.

The Court has previously upheld the use of similar presumptions in analogous contexts. For example, in upholding provisions of the Voting Rights Act of 1965, the Court held that, pursuant to its enforcement powers under Section Two of the Fifteenth Amendment, Congress could presume that any State or political subdivision employing a literacy test was using that test in a racially discriminatory manner if less than 50% of the voting-age residents were registered to vote as of November 1, 1964. *South Carolina v. Katzenbach*, 383 U.S. 301, 317, 329 (1966). The Court held that the termination procedures afforded by the Act, which allowed a State or political subdivision to terminate statutory coverage by proving that it had not used literacy tests in a

racially discriminatory manner in the preceding five years, were sufficient to avoid any danger of overbreadth. *Id.* at 331-32. And the Court has held in Title VII cases that proof of a pattern and practice of racial discrimination in hiring gives rise to a rebuttable presumption that each member of the class who unsuccessfully applied for a position is entitled to relief, subject to proof by the employer that its refusal to hire a particular individual was not based on race. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359 & n.45, 362 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976). The presumption of disadvantage afforded by the DOT's regulations operates no differently from the presumptions upheld in these cases, and affords the same protection against overbreadth by allowing anyone aggrieved by the presumption to prove that the presumption is unwarranted.

B. The DBE Program Is Narrowly Tailored to Remedy Ongoing Effects of Identified Forms of Discrimination in the Construction Industry.

1. The DBE Program in Part Remedies Effects of Entry Level Discrimination.

The major component of entry level discrimination that has been significantly documented through academic research is unequal access to capital. The most direct remedy for this particular entry-level form of discrimination would undoubtedly focus on boosting access to start-up and working capital for minorities in the construction industry. However, there can be no doubt that this barrier is also somewhat reduced through a narrowly tailored subcontracting goals program as authorized under the DBE program. The enhancement to subcontract opportunities for DBE firms, in part, creates new employment opportunities for minorities.[5]

[5] Recent academic research by Dr. Timothy Bates has confirmed that minority-owned businesses (many of which qualify for the DBE program) tend to hire significantly higher proportions of minorities in their labor forces than do non-minority owned firms.

Furthermore, enhancement of subcontracting opportunities for minority-owned construction firms is a necessary component to any successful remedy that is directed towards increasing access to capital. For several decades, the federal government has used race-neutral small business loan programs through the SBA to boost access to capital for smaller and newer businesses. However, these efforts have failed miserably to eliminate the significant disparity that exists in access to credit and capital for minority-owned businesses. This is because "smallness" and "newness" are not the only factors that limit capital access for minority-owned businesses. One essential component of any lender's analysis of a loan application is whether the loan applicant has sufficient cash flow and revenues to repay the loan. Because the DBE program increases subcontract opportunities and cash flow for those firms that have been disadvantaged by discrimination, their access to capital through small business lending programs (and even standard commercial loans) is also enhanced.

2. The DBE Program, in Part, Remedies the Effects of Various Forms of Discrimination in the Construction Industry.

As elaborately documented in the congressional record, there are many forms of ongoing marketplace discrimination in the construction industry that adversely affect the ability of established minority contractors to compete for contracts. There are several forms of marketplace discrimination that are remedied, in part, by the enhanced opportunities for subcontracting provided by the DBE program.

(a) "Good-Old-Boy" Networks

One of the most debilitating effects of the good-old-boy network that excludes minority-owned contractors from

knowledge about private sector jobs and subcontracting opportunities is that they are altogether left out of the bidding process for subcontracts. In private sector construction contracts, unlike government contracts, a prime contractor is often under no obligation to competitively bid out subcontracted portions of the work. Where there is competition for such contracts, prime and subcontract bids are frequently by invitation only. There have been many instances where minority contractors have specifically requested an opportunity for such invitations to bid on private sector contracts only to be completely ignored by the prime contractors. This private sector discrimination is particularly significant because it is estimated that virtually 90% of all commercial activity occurs on non-government funded contracts.

The DBE program helps to counteract the operation of the good-old-boy network in two ways. First, it strongly encourages solicitation of bids by prime contractors from minority subcontractors on government construction projects. Second, by encouraging prime contractors to work with DBE subcontractors, it helps to introduce new blood into an industry that otherwise would have no opportunity for establishing such working relationships through traditional social interaction. Social barriers from race remain fairly high in the construction industry. In addition, the increased market access and revenues that DBEs obtain through the DBE program partially offset revenues lost by DBEs from discriminatory barriers on more lucrative private sector jobs. Revenue and profit growth are essential to building increased capacity and price competitiveness.

(b) Unequal Access to Bonding

Discrimination that results in DBEs being unable to obtain bonds or in paying higher rates for bonds also undermines their ability to compete for subcontracts. While the race-neutral approach of increasing the dollar thresholds for

bonding requirements helps to ameliorate this problem on the smallest of contracts, it does little to address the lack of bonding track record for DBEs that thwarts their ability to become a prime contractor where bonding is required. Similarly, for those larger contracts where subcontractors are required to post bonds, the cost differential in bonding rates for DBEs of only one or two percent can frequently be the difference between winning and losing a bid.

However, the DBE program helps to level the playing field by enabling recipients to encourage prime contractors to assist DBE subcontractors in obtaining bonds, and also in helping DBE subcontractors develop a performance track record that they would otherwise not likely develop.[6]

(c) Price Discrimination by Suppliers

One of the most devastating forms of discrimination in the construction industry is price discrimination by suppliers. Suppliers that conspire with the competitors of DBE firms to quote them better prices for the same quantity of materials of like grade and quality than they offer to DBE firms can determine the outcome of a bid. Depending on the type of construction, materials and supplies can account for the majority of the cost of an overall bid.

The DBE program helps to undermine the chances for such successful collusion by increasing the chances for DBE contract participation. When suppliers realize that there is a greater likelihood that a DBE subcontractor may win a contract, competitive pressures to sell supplies for that portion of the job increase the likelihood that one or more suppliers will quote the DBE subcontractor a fair price.

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[6] In addition to capital and credit, bonding companies typically consider competence as measured by a performance track record on jobs of a certain size in deciding whether to issue a bond to a contractor, and at what rate.

(d) Unfair Denial of Opportunities to Bid

Several disparity studies have reported increased resistance from white-owned prime contractors to accepting bids from minority-owned subcontractors once affirmative action remedies were no longer in effect. Again, the DBE program directly addresses the effects of this form of discrimination by enabling recipients to require affirmative good-faith efforts on the part of prime contractors to solicit bids from DBE subcontractors, under appropriate circumstances.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Amici Curiae Office of Communication of the United Church of Christ, Minority Media and Telecommunications Council, Alliance for Community Media, American Federation of Television and Radio Artists, American Hispanic Owned Radio Association, Black College Communication Association, Civil Rights Forum on Telecommunications Policy, Media Action Network of Asian Americans, National Asian American Telecommunications Association, National Association of Black Journalists, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association of Hispanic Journalists, National Association of Minorities in Communications, National Association of Minority Media Executives, National Hispanic Media Coalition, Telecommunications Research and Action Council, and Women's Institute for Freedom of the Press, In Support of Respondents

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Summary of Argument	7
Argument	8
Programs Using The Basic Design Of DOT's Current DBE Program Can Satisfy Strict Scrutiny	8
A. The Court Of Appeals Wisely Afforded Considerable Deference To Congressional Findings And Legislative History	8
B. The Court Of Appeals Correctly Found That DOT's Current DBE Program Served The Compelling Interests Of Not Perpetuating, And Of Remedying, The Consequences Of Racial Discrimination In The Government's Own Distribution Of Federal Funds	14
C. The Court Of Appeals Correctly Found That Discrimination In Contracting Is National In Scope	18
Conclusion	23

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)	*passim*
Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000)	*passim*
Bob Jones University v. United States, 461 U.S. 574 (1983)	14
Brown v. Board of Education, 357 U.S. 483 (1954)	16
Bush v. Gore, 531 U.S. 98 (2000)	20
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	14
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	19
Fullilove v. Klutznick, 448 U.S. 448 (1980)	*passim*
Hirabayashi v. United States, 320 U.S. 81 (1943)	13
Korematsu v. United States, 323 U.S. 214 (1944)	13

Cases (continued)	Page
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	8
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	6
Mitchell v. United States, 313 U.S. 80 (1941)	24
Norwood v. Harrison, 413 U.S. 455 (1973)	14
Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)	1, 16
Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969)	16
Oregon v. Mitchell, 400 U.S. 112 (1970)	12, 18
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	6, 9
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	8, 20
United Jewish Organizations v. Carey, 430 U.S. 144 (1977)	19

Page

Cases (continued)

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 12

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) *passim*

Administrative Materials

Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Service, 8 F.C.C.R. 7162 (1993), *modified*, 9 F.C.C.R. 1309 (1994), *further modified*, 9 F.C.C.R. 4519 (1994), *rev'd in part on other grounds sub nom. Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) 19

Glencairn, Ltd., No. 1800E1-LS (FCC Mass Media Bureau, March 15, 1999) 22

New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants, 87 F.C.C.2d 200 (1981) 16

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 16

Page

Administrative Materials (continued)

Race and Gender Based Provisions for Auctioning C Block Broadband Personal Communications Service Licenses, Sixth Report and Order, 60 Fed. Reg. 37,786 (1995) 21

Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 F.C.C.R. 2329 (2000), *reversed in part sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, *rehearing and rehearing en banc denied*, No. 00-1094 (released June 19, 2001) 17

Review of the Commission's Regulations Governing Television Broadcasting, 14 F.C.C.R. 12,903 (1999) 20

Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 F.C.C.R. 6280 (1996) 17

Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 15 F.C.C.R. 15,376 (2000) 22

Page

Administrative Materials (continued)

Southland Television Co., 10 Rad. Reg. (P & F) 699, *recon. denied*, 20 F.C.C. 159 (1955) 16

Ultravision Broadcasting Company, 1 F.C.C.2d 545 (1965) 16

U.S. Constitution

U.S. Const., Amend. 13 8

U.S. Const., Amend. 14 10

Statutes and Legislative Materials

47 U.S.C. § 151 (1996) 15

47 U.S.C. § 257(a) (1996) 22

47 U.S.C. § 307(a) (1996) 16

Page

Statutes and Legislative Materials (continued)

49 U.S.C. § 3(1) (1958) 15

Administrative Procedure Act, 5 U.S.C. § 553 (2001) 21

Hearings on H.R. 8301 Before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong. 2d Sess. 14 (1934) (testimony of Dr. Irvin Stewart, Department of State) (reprinted in Max D. Paglin, ed., *A Legislative History of the Communications Act of 1934* 360 (1989) 15

H.R. Conf. Rep. 765, 97th Cong. 2d Sess. 43 (1982) 22

Interstate Commerce Act, Part I, 24 Stat. 380 (1887) 15

Self-Employed Persons Health Care Deduction Extension Act of 1995, Pub. L. No. 104-7, 2, 109 Stat. 93 (1995) 21

Page

Other Authorities

S.J. Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Peña*, 4 CommLaw Conspectus 237 (1996) 17

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FCC Office of General Counsel, Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present (December, 2000) 22

Taylor Branch, *Parting the Waters: America in the King Years, 1954-1963* (1988) 23

Address of General Colin Powell, Republican National Convention, August 12, 1996 23

INTEREST OF AMICI CURIAE

Amici comprise a broad spectrum of nonprofit, nonpartisan organizations with decades of experience with issues falling in the intersection between communications policy and civil rights.[1]

The Office of Communication of the United Church of Christ ("OC/UCC"), founded in 1965, is an instrumentality of the United Church of Christ, a Protestant denomination of approximately 1.6 million members nationwide. OC/UCC was the first program of national scope aimed at promoting racial diversity in the mass media. Its pioneering work in integrating southern television stations led to the landmark ruling affirming the standing of listeners and viewers to participate in broadcast licensing proceedings. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*"UCC I"*). OC/UCC has participated in dozens of FCC proceedings over the past four decades as an advocate for minorities and women in the mass media and in telecommunications.

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1 Pursuant to S. Ct. Rule 37.3(a), *amici* affirm that consent to file this brief has been granted by all parties. Pursuant to S. Ct. Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

The Minority Media and Telecommunications Council ("MMTC") is an association of lawyers, engineers and scholars who provide *pro bono* support to civil rights organizations in policy and rulemaking matters before the FCC. MMTC promotes FCC rules and private industry initiatives aimed at increasing opportunities for minorities to own media and telecommunications facilities. MMTC also operates the nation's only minority-owned media and telecommunications brokerage.

The Alliance for Community Media represents public, educational and governmental access organizations and public access internet centers throughout the country. The Alliance helps assure broad access to electronic media through public education, building coalitions and supporting local organizing.

The American Federation of Television and Radio Artists, AFL-CIO ("AFTRA"), originally founded as the American Federation of Radio Artists in 1937, is a national labor organization representing over 80,000 performers and newspersons employed in the news, entertainment, advertising and sound recording industries. AFTRA negotiates and administers over 300 national and local collective bargaining agreements with producers, broadcasters, cable programmers, recording labels, advertising agencies and other employers of performers and journalists nationwide.

The American Hispanic Owned Radio Association ("AHORA") promotes business opportunities for Hispanic American broadcasters. AHORA seeks to increase the number of Hispanic Americans in the broadcasting industry and protect the interests of the Hispanic American broadcast station owners.

The Black College Communications Association ("BCCA") is composed of 28 institutions of higher education with broadcasting or journalism programs. BCCA develops intercollegiate efforts to advance black students' entry into media professions.

The Civil Rights Forum on Telecommunications Policy is a project of the Tides Center. The Forum is a research and educational organizations which analyzes communications policy with a focus on equal rights under the law and democratic values.

The Media Action Network of Asian Americans is dedicated to monitoring the mass media and advocating balanced, sensitive and positive coverage and depiction of Asian Americans.

The National Asian American Telecommunications Association is an association of filmmakers, educators and community leaders engaged in and supporting the production, presentation and distribution of Asian American films and videos designed to educate the American public about Asian American history and contemporary life.

The National Association of Black Journalists ("NABJ") is composed of over 3,000 black journalists. NABJ holds conferences and organizes mentoring and membership assistance programs aimed at increasing minority participation in print and electronic journalism.

The National Association of Black Owned Broadcasters is ("NABOB") is composed of over 200 commercial radio and television stations. NABOB counts law firms, station brokers, national rep firms, and financial institutions as associate members. NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success for African Americans and all other minority station owners.

The National Association of Black Telecommunications Professionals ("NABTP") is composed of 1,200 telecommunications professionals, small business owners and students. NABTP's mission is to be the premier source of education and information about the telecommunications industry for its members, interfacing organizations and the public, with a specific emphasis on the black community.

The National Association of Hispanic Journalists includes 1,500 working journalists, other media professionals, students and scholars. It is dedicated to the recognition and professional advancement of Hispanics in the news industry.

The National Association of Minorities in Communications, through its local chapters, promotes employment, program service, goods and services contracting, and ownership of cable television companies by minorities.

The National Association of Minority Media Executives ("NAMME") is an organization of media news and business managers and executives working in newspapers, broadcasting, magazines and new media. NAMME encourages diversity in the senior ranks of the media industry, as well as better coverage of multicultural communities. It offers executive development programs, management training and mentoring of new and middle managers.

The National Hispanic Media Coalition ("NHMC") is an association of two dozen constituent organizations representing all facets of Hispanic American business, consumer, educational and cultural life. NHMC strives to stimulate employment and ownership opportunities for Hispanics in all mass media.

The Telecommunications Research and Action Council ("TRAC") promotes the interests of residential telecommunications consumers. TRAC seeks to expand telecommunications service to all Americans, bridging the racial and economic "digital divide" in access to telecommunications technology.

The Women's Institute for Freedom of the Press is a national network of media women seeking to extend freedom of the press to a wide array of individuals and organizations.

Amici concur with the *amicus* briefs being filed by the Lawyers Committee for Civil Rights Under Law *et al.*, the Minority Business Enterprise Legal Defense Fund, Inc. *et al.* and the National Asian Pacific American Legal Consortium *et al.*

Federal programs designed, *inter alia*, to remedy the effects of past discrimination most often arise in three contexts: procurement (*e.g.*, the case at bar), education (*e.g., Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978) ("*Bakke*") and communications (*e.g., Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990)). *Amici* are focused on communications. Each *amicus* has advocated congressionally mandated FCC policies designed to remedy the effects of past discrimination, proscribe current discrimination, prevent future discrimination, promote economic opportunity and competition and expand access to a broad diversity of viewpoints.

The standards for judicial review of these programs are potentially at issue in this case. Consequently, *amici* aim to draw the Court's attention to those aspects of this case which are most likely to reverberate in the world of media and telecommunications.

SUMMARY OF ARGUMENT

The Court should reaffirm that Congress' "comprehensive remedial power" is broad enough to include measures to eliminate barriers that excluded minorities from government benefits. *Fullilove v. Klutznick,* 448 U.S. 448, 483 (1980) ("*Fullilove*"). In doing so, this Court should consider three portions of the court of appeals' decision in *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*") to be especially worthy of affirmance.

First, the court of appeals acted wisely in deferring to congressional fact-finding. *See infra* pp. 8-14.

Second, the court of appeals accurately defined the compelling governmental interests in need of remediation. Those interests are not perpetuating, and remedying, the consequences of the government's use of tax revenues to facilitate race discrimination. *See infra* pp. 14-18.

Third, the court of appeals correctly recognized that Congress is empowered to determine that discrimination in contracting is national in scope and requires a national remedy. *See infra* pp. 18-23.

ARGUMENT

Programs Using The Basic Design Of DOT's Current DBE Program Can Satisfy Strict Scrutiny

In its decision below, the Court of Appeals has provided a useful and easily understandable model for discerning whether the government's interest in remedying discrimination in a particular industry or institution is compelling and whether the remedy is narrowly tailored to the injury. Three well-reasoned portions of the court of appeals' decision particularly deserve affirmance.

A. The Court Of Appeals Wisely Afforded Considerable Deference To Congressional Findings And Legislative History

Congress has extensive remedial power to confront society-wide inequality and discrimination. In addressing these problems, Congress' freedom to choose legislative ends and means is long-established,[2] and has been reaffirmed in *Fullilove*. The Court in *Fullilove* dealt squarely with the racial aspects of the remedial program under consideration and the nature and quantum of

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2 *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (holding that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("[a]s against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.")

evidence needed to justify it.[3] As the court of appeals accurately noted, "nothing in *Adarand III* [*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)] undermines the conclusion of the lead *Fullilove* opinion that 'Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement

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3 In *Fullilove*, the Court did not use the term "strict scrutiny", although Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Id.*, 448 U.S. at 491. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in his opinion in *Bakke* -- *i.e.*, it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest", and had done so correctly. *Fullilove*, 448 U.S. at 496 (Powell, J., concurring).

practices that perpetuated the effects of prior discrimination.'") *Adarand VII* at 1175 n. 17.[4]

In its review of Congress' intentions, the court of appeals assessed the legislative history and the evidence of record to determine whether the asserted governmental interest was compelling. While discarding conclusory statements of elected officials,[5] the court of appeals deemed it only fair to

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4 In *Fullilove*, Chief Justice Burger stated that "[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the general Welfare of the United States' and 'to enforce, by appropriate legislation the equal protection guarantees of the Fourteenth Amendment' . . ." 448 U.S. at 472. Chief Justice Burger explained that "[i]n dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment." *Id.* Recognizing that *Fullilove* was overruled largely because it failed to apply strict scrutiny, the court of appeals concluded that *Adarand III* had left in place other holdings of *Fullilove*, "most notably its factual determinations regarding congressional findings and the legislative history of the SBA discussed in the Chief Justice's opinion and further elaborated upon in the concurring opinion of Justice Powell." *Adarand VII*, 228 F.3d at 1162 n. 6. The evidence in *Fullilove* included a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises, much of which resulted from barriers to competitive access which had its roots in race discrimination, including discrimination traceable to federal, state and local contracting. *Fullilove*, 448 U.S. at 478.

5 *Adarand VII*, 228 F.3d at 1167 ("[o]f course, statements made with regard to discrimination in the subcontracting industry by congressional reports and by members of Congress are insufficient in themselves to support a finding of compelling interest.")

consider the widest range of competent evidence -- statistical and anecdotal, direct and circumstantial, pre-enactment and post-enactment. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986) (O'Connor, J., concurring) ("*Wygant*") (statistical proof supplies the court with the means for concluding that remedial acts are appropriate.)[6]

Upon evaluating the evidence, the court of appeals found extensive exclusion of minority contractors and barriers to entry. *Adarand VII*, 228 F.3d at 1167-76. DOT submitted extensive evidence of public and private discrimination in

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6 When a judge considering a race-conscious remedial program admits all of the proferred evidence she fairly can admit -- but nonetheless holds that the program fails to satisfy strict scrutiny -- the litigants will appreciate that the program failed because of its substantive legal shortcomings, not because of procedural rulings. On the other hand, a program that deserves approval under strict scrutiny should not be undermined by a judge's needlessly crabbed evidentiary rulings. Given the high evidentiary hurdle required under the strict scrutiny standard, there is little risk that weak evidentiary showings could ever lead to the routine authorization of race-conscious programs.

government procurement and in highway construction generally. *Id.* at 1166-67.[7] The court of appeals found that this discrimination inhibited entry by minority contractors and distorted the market for public contracts so that the overwhelming majority of contracts went to firms owned by white men. *Id.* at 1170-73. Finally, the court of appeals affirmed the trial court's conclusion that the evidence showed "a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 1167-68.

The court of appeals also properly deferred to Congress' evaluation of potential narrowly tailored remedies. DOT provided extensive documentation that race-neutral remedies had proven unsuccessful. Drawing its key inference from strong evidentiary

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7 The overwhelming array of competent research by disinterested academics contained in the record of this case would have permitted any reviewing court to find the asserted governmental interest to be compelling. Indeed, the weight and sufficiency of the evidence calls to mind *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n. 1 (1979), where this Court found that "judicial findings of exclusiveness from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *See also Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) ("*Mitchell*") (unanimously upholding ban on literacy tests where Congress had "substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement.")

findings, the court of appeals found that when race-conscious public contracting programs had been struck down or discontinued, minority business participation in the relevant market declined sharply or even disappeared. *Id.* at 1174. The court of appeals recognized that Congress only implemented a race-conscious remedy because of a fact Congress could not avoid: its "efforts dating back at least to the enactment in 1958 of the SBA to employ race-neutral measures" had failed to remedy the consequences of "[t]he long history of discrimination in, and affecting, the public construction procurement market[.]" *Id.* at 1178. Thus, the court of appeals acted reasonably in finding that race-neutral steps were palpably insufficient to provide a meaningful remedy. Its findings were firmly grounded in the historical record, not in "paternalistic stereotyping."[8]

In all respects, then, the court of appeals' deference to Congress and the manner in which the court of appeals exercised that deference were reasonable and consistent with precedent.

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8 *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment) (*discussing Bakke*, 438 U.S. at 360-361). *Amici* note that strict scrutiny is not a failsafe device for excluding racial prejudice from government decisionmaking, as was most painfully demonstrated in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). In both cases, despite assurances that strict scrutiny was being applied, the Court upheld the government's internment of Japanese Americans solely on the basis of their ancestry. The wisdom to be taken from *Korematsu* and *Hirabayashi* is not that strict scrutiny review should be even stricter, but that it should be sensitive enough to exclude stereotyping while allowing government to achieve its lawful objectives.

B. The Court Of Appeals Correctly Found That DOT's Current DBE Program Served The Compelling Interests Of Not Perpetuating, And Of Remedying, The Consequences Of Racial Discrimination In The Government's Own Distribution Of Federal Funds

In the affirmative action context, the Court has identified three potentially compelling governmental interests. The first two were defined in *Wygant* as "remedying past or present racial discrimination by a state actor" and "promotion of racial diversity . . . at least in the context of higher education." *Id.*, 476 U.S. at 286 (O'Connor, J., concurring). A third rationale is government's "compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).[9]

In *Adarand VII*, the court of appeals correctly defined the applicable compelling governmental interests as "not perpetuating the effects of racial

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9 As this Court has recognized, government acts impermissibly when it distributes public resources in a manner that perpetuates discrimination. *See Bob Jones University v. United States*, 461 U.S. 574, 595 (1983) (holding that government should not encourage educational institutions that practice racial discrimination "by having all taxpayers share in their support by way of special tax status"); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (holding that it is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted). Awarding contracts to firms that discriminate privately is "inducing, encouraging or promoting" discrimination."

discrimination in [the government's] own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by [government] disbursements." *Adarand VII*, 228 F.3d at 1165. The court of appeals' definitions of the compelling governmental interests resonate strongly with *amici*, whose civil rights work centers on the communications industries. Like highway transportation, communications uses public rights-of-way to foster national social and economic interaction. Regulation of transportation and communications each descended from the same statutory progenitor -- the Interstate Commerce Act, which was enacted in 1887.[10] The first sentence of the legislation authorizing the FCC provides that the agency was created, *inter alia*, "so as to make available, so far as possible, to all the people of the United States, without discrimination *on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (emphasis supplied).[11]

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10 *Hearings on H.R. 8301 Before the Committee on Interstate and Foreign Commerce, House of Representatives*, 73rd Cong. 2d Sess. 14 (1934) (testimony of Dr. Irvin Stewart, Department of State) (reprinted in Max D. Paglin, ed., *A Legislative History of the Communications Act of 1934* 360 (1989) (describing how communications and transportation regulation each evolved from the Interstate Commerce Act).

11 47 U.S.C. § 151 (1996). *Compare* Interstate Commerce Act, Part I, 24 Stat. 380 (1887), 49 U.S.C. § 3(1) (1958) (prohibiting common carriers from giving "undue or unreasonable preference or advance to any particular person . . . in any respect whatsoever, or [subjecting] any particular person . . . to any unreasonable or undue prejudice or disadvantage.")

Like DOT, the FCC contravened its mandate for decades by providing extensive and unseemly assistance to discriminators. Acting through its exclusive power to issue broadcast licenses,[12] the FCC routinely provided, renewed and authorized the assignment and transfer of licenses to segregated companies and institutions.[13] These licensees, in

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12 47 U.S.C. § 307(a) (1996).

13 Even after *Brown v. Board of Education*, 357 U.S. 483 (1954), the FCC routinely granted and renewed licenses of broadcasters that discriminated, and in doing so openly embraced state segregation laws. *See, e.g., Southland Television Co.*, 10 Rad. Reg. (P & F) 699, *recon. denied*, 20 F.C.C. 159 (1955), in which the FCC awarded a VHF-TV license to a segregationist so rabid that he built one-story movie theaters to evade Louisiana's law requiring theater owners to admit blacks to one floor of a two-story theater. The FCC justified its action by declaring that "[a]dmission of Negroes [only] to theatre balconies appears to be legal in Louisiana." *Id.* at 750. *See also UCC I* (requiring the FCC to hold a hearing on allegations that WLBT-TV, Jackson, MS, discriminated against blacks in programming) and *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) ("*UCC II*") (vacating WLBT-TV's license renewal after the FCC held a sham hearing). Segregation in broadcast education denied minorities an opportunity to obtain broadcast experience and a record of broadcast operation, yet the FCC still credited these factors when awarding broadcast licenses in comparative hearings. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 396-98 (1965). Finally, the FCC did not repeal an overbroad broadcast financial requirement until 1981, when it recognized that the former rule prevented minorities from securing broadcast licenses. *New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 F.C.C.2d 200, 201 (1981) (*repealing Ultravision Broadcasting Company*, 1 F.C.C.2d 545, 547 (1965)).

turn, trained the next generations of broadcaster owners and managers. These FCC licensing decisions ensured that two successive generations of broadcast professionals, managers and owners were almost exclusively white and male.[14] In communications as in highway construction, substantial remediation will be required to overcome the natural tendency of a homogeneous group to replicate itself in successive generations.[15]

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14 Eventually, the FCC acknowledged that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and . . . special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum." *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry)*, 11 F.C.C.R. 6280, 6306 (1996).

15 An effort by the FCC to remedy and prevent discrimination in broadcast and cable employment by requiring broad job recruitment was recently rejected by the D.C. Circuit, which applied strict scrutiny. *Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies*, 15 F.C.C.R. 2329 (2000), *reversed in part sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, *rehearing and rehearing en banc denied*, No. 00-1094 (released June 19, 2001). Dissenting from the denial of rehearing *en banc*, Judges Tatel, Edwards and Rogers noted that "[d]etermining whether an outreach program crosses the line from expanding opportunities for minorities to disadvantaging nonminorities, thus triggering strict scrutiny - and if so whether the program survives - are difficult issues that neither we nor the Supreme Court has yet considered." Dissenting Opinion, Slip Op. at 5. A thorough discussion of the FCC's EEO jurisprudence may be found in S.J. Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Peña*, 4 CommLaw Conspectus 237 (1996).

Regulatory initiatives such as DOT's and the FCC's, backed by strong records that include legislative findings, are uniquely suited to achieve comprehensive remedies. The Court should defer to Congress, and administrative bodies with subject matter expertise, when they undertake to research and remedy the consequences of government-sponsored and government-aided discrimination.

C. The Court Of Appeals Correctly Found That Discrimination In Contracting Is National In Scope

When discrimination occurs nationally, its remedy must be structured nationally. As the court of appeals found here, "[t]he remediation of nationwide problems . . . is particularly within the purview of Congress, and findings of industry-wide discrimination are precisely what is relevant to a federal decision to undertake remedial action." *Adarand VII*, 228 F.3d at 1163 n.8.

It is well established that Congress need not measure the extent of a problem in every corner of the nation to find that it must implement reform nationally. *See, e.g., Mitchell*, 400 U.S. at 133 (upholding Congress' determination that a nationwide ban on literacy tests was appropriate where "Congress has recognized a national problem for what it is -- a serious *national* dilemma that

touches every corner of our land" (emphasis in original)).[16]

Congress' ability to address nationwide discrimination through nationwide solutions is essential to the effective regulation of every industry that operates across state lines. The industries with which *amici* are most concerned present a prime example. Personal Communications Service (PCS) telephony operates in 492 local markets.[17]

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16 National remediation for national discrimination has an additional advantage: it ensures that the burden of remediation of the conditions caused by nationwide practices is not borne by citizens of only a few communities. As this Court has pointed out, spreading the costs of remediation is a primary goal of narrow tailoring. *See Wygant*, 476 U.S. at 281 ("when effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible" (*quoting Fullilove*, 448 U.S. at 484, *in turn quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976)). However, a remedy should only "impose a diffuse burden, often foreclosing only one of several opportunities[.]" *Wygant*, 476 U.S. at 283. *See also United Jewish Organizations v. Carey*, 430 U.S. 144, 165 (1977) (redistricting plan authorized no "fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.")

17 *See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Service*, 8 F.C.C.R. 7162, 7167 ¶ 28 (1993), *modified*, 9 F.C.C.R. 1309 (1994), *further modified*, 9 F.C.C.R. 4519 (1994), *rev'd in part on other grounds sub nom. Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997).

Television and cable television are organized into 211 different Nielsen-rated television markets.[18] Radio is organized into 283 Arbitron-rated markets.[19] A requirement that legislation be particularized to address each parochial quirk of discrimination in each of these markets would place the cost of designing remediation far out of reach. Such an interpretation would render strict scrutiny aimed at redressing nationally-occurring discrimination "fatal in fact"[20] for every federal program.[21]

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18 *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903, 12,926 ¶ 47 (1999). These markets are identified and ranked in BIA Financial Network, *Television Market Report 2001* 4-5 (2001).

19 These markets are identified and ranked in BIA Financial Network, *Radio Market Report 2001* 4-5 (2001).

20 *Adarand III*, 515 U.S. at 237 (*quoting Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment)).

21 A closely analogous situation is found in the field of voting rights. This Court recently found that citizens in multiple jurisdictions within a state deserve roughly equivalent treatment at the polls. *Bush v. Gore*, 531 U.S. 98, Slip Op. at 6 (2000) ("[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.") National standards may be the only way to address this and other problems of national scope. As this Court has recognized in the voting rights field, "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina v. Katzenbach*, 383 U.S. at 328.

Opening the door, narrowly, to national remedies that satisfy strict scrutiny is unlikely to engender a host of poorly designed initiatives. When drafting any remedial regulations, federal agencies typically spend hundreds of thousands of dollars to carefully define the harm to be remedied or prevented, and to structure the remedy so as to avoid over- or under-inclusiveness or disproportionate burdens on third parties. These expenditures are subject to congressional oversight, and to the transparency inherent in the administrative rulemaking process.[22]

In its recent efforts to remedy its previous record of subsidizing discrimination, the FCC provides a commendable example of responsible remediation.[23] At every stage of its administration

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22 *See* Administrative Procedure Act, 5 U.S.C. § 553 (2001) (providing for publication of proposed rules, consideration of comments, and public justification of the basis for rules upon their adoption).

23 Immediately following *Adarand III*, the FCC suspended the race- and gender-conscious provisions of its regulations governing auctions of certain wireless facilities, in large part to avoid delays that might have resulted from litigation. *Race and Gender Based Provisions for Auctioning C Block Broadband Personal Communications Service Licenses, Sixth Report and Order*, 60 Fed. Reg. 37,786 (1995). Another very successful FCC program, the tax certificate policy, initiated in 1978, provided sellers of broadcast and cable properties with a tax deferral incentive to sell to a minority owned business. Congress eliminated this policy in 1995. Self-Employed Persons Health Care Deduction Extension Act of 1995, Pub. L. No. 104-7, 2, 109 Stat. 93 (1995). A thorough discussion of the FCC's minority ownership policies may be found in A. Bush and M. Martin, *The FCC's Minority Ownership Policies From Broadcasting to PCS*, 48 Fed. Comm. L.J. 423 (1996).

of programs designed to foster minority ownership and employment, the agency has acted pursuant to congressional oversight.[24] The FCC has conducted extensive research to fashion its remedial initiatives,[25] and it has undertaken genuine efforts to use the least burdensome, least race-conscious and most effective approaches available.[26] Moreover, the FCC has undertaken to detect fronts, frauds and abuse.[27] The methodological,

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24 *See, e.g.*, H.R. Conf. Rep. 765, 97th Cong. 2d Sess. 43 (1982) (finding the paucity of minority broadcast licensees to be partly attributable to past discrimination). *See also* 47 U.S.C. § 257(a) (1996) (requiring the FCC to complete a proceeding to eliminate "market entry barriers for entrepreneurs and other small businesses" in telecommunications), pursuant to which the FCC issued its *Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, 15 F.C.C.R. 15,376 (2000).

25 *See, e.g.*, FCC Office of General Counsel, Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present (December, 2000).

26 *See* supra p. 17 n. 15 (describing recent history of the FCC's efforts to fashion a broadcast and cable employment recruitment program).

27 *See, e.g., Glencairn, Ltd.*, No. 1800E1-LS, at 2 (FCC Mass Media Bureau, March 15, 1999) (on file with counsel of record) (opening an investigation, *inter alia*, into whether provisions of an agreement under which a television licensee was required to use the programming services of a much larger licensee "violated the [smaller] licensee's fundamental right and obligation to determine the type of programming to be aired on its station.") The Bureau was responding to allegations that the larger television licensee improperly exercises *de facto* control of the smaller licensee.

incremental and deliberate approach to remediation taken by agencies such as the FCC suggests that federal agencies will act responsibly if this Court validates DOT's current DBE program.

CONCLUSION

For over two generations, equal access to transportation has occupied a central place in our nation's civil rights history and jurisprudence.[28] This case presents the Court with an historic opportunity to affirm that all Americans may enjoy a reasonable opportunity not only to ride on our highways, but to build them.

Our Secretary of State has framed the federal government's remedial duty as "not only to cut off and kill discrimination, but to open every avenue of educational and economic opportunity to those who are still denied access because of their race, ethnic background or gender." Address of General Colin Powell, Republican National Convention, August 12, 1996. The task of opening "every avenue of . . . opportunity" is not so daunting that it entirely evades solution. By affirming the court of appeals, this Court can enable Congress, and agencies acting under its direction, to deliver us at last to a time and place where none of us bears the weight of past discrimination.

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28 *See Mitchell v. United States*, 313 U.S. 80, 95 (1941) (holding that failure to provide blacks with first-class accommodations equal to those furnished whites violated the Interstate Commerce Act). *See also generally* Taylor Branch, *Parting the Waters: America in the King Years, 1954-1963* 143-205 (1988) (discussing Montgomery bus boycott and its aftermath).

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No. 00-730

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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

—v.—

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND, LAWYERS COMMITTEE FOR HUMAN RIGHTS, AND ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied the strict scrutiny standard in determining that Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling government interest.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
FACTUAL AND PROCEDURAL BACKGROUND	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. INTERNATIONAL AND COMPARATIVE LAW ARE RELEVANT SOURCES OF INTERPRETIVE GUIDANCE	4
II. INTERNATIONAL AND COMPARATIVE LAW SUPPORT THE CONSTITUTIONALITY OF THE DBE PROGRAM	10
A. Treaties to Which the United States Is a Party Embrace Affirmative Action	10
B. High Courts in Other Jurisdictions Have Upheld Affirmative Action Measures	14

	PAGE
1. Other Nations Have Found That National Governments Have a Strong Interest in Supporting Flexible Affirmative Action Policies That Realize Constitutional Guarantees of Equality	14
2. Other Jurisdictions Analyze Affirmative Action Measures to Ensure a Proper Fit Between Means and Ends and Have Endorsed Measures Analogous to the DOT Program	22
CONCLUSION	30
APPENDIX	1a

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STATEMENT OF INTEREST

Amici curiae are non-profit organizations dedicated to using international and domestic law to promote civil and human rights.[1]

FACTUAL AND PROCEDURAL BACKGROUND

At issue in this case is the Disadvantaged Business Enterprise ("DBE") program of the U.S. Department of Transportation ("DOT"), which implements the congressional mandate—first established in the Small Business Act ("SBA"), and reaffirmed in subsequent legislation—of ensuring that "small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1) (1997).

To carry out Congress's mandate, the DBE program must successfully target the disadvantaged. The program therefore establishes several routes through which individuals may qualify. While individuals from certain racial groups are presumed to be socially and economically disadvantaged, that presumption is far from conclusive and may be rebutted by evidence to the contrary. All individuals claiming to be disadvantaged must submit affidavits affirming that they are in fact socially and economically disadvantaged within the meaning of the

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[1] The separate statements of interest of each of the *amici* non-profit organizations are included in the Appendix. *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, nor has any person or entity other than *amici* and their counsel made any monetary contribution to its preparation. Letters of consent by the parties to the filing of this Brief have been lodged with the Clerk of this Court.

statute. 49 C.F.R. § 26.67(a)(1); 64 Fed. Reg. 5096, 5136 (1999). Individuals who are not subject to the presumption, but who in fact *are* socially and economically disadvantaged, may also be certified to participate in the program. 49 C.F.R. § 26.67(b)(2). Petitioner, who was not subject to the presumption, was granted DBE certification under the revised program. Pet. App. 7-9.

The DBE regulations specifically prohibit any use of quotas or set-asides. 49 C.F.R. § 26.43; 64 Fed. Reg. 5096, 5107-08 (1999). There are also strict durational limits on the DBE program. Each certified contractor's presumption of social and economic disadvantage lapses after three years, and the DBE program itself expires at the end of six years.

Applying the strict scrutiny test mandated for review of racial classifications by this Court's Equal Protection Clause jurisprudence—to determine whether the program is "narrowly tailored" to advance a "compelling" federal interest—the Tenth Circuit held that the current DBE program passes constitutional muster. First, the court concluded that the government had sufficiently demonstrated a compelling interest in "not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." Pet. App. 26. Second, the Tenth Circuit concluded that the DBE program, as currently structured, was narrowly tailored when considered in light of factors including the availability of race-neutral alternative remedies, the duration of the race-conscious measures at issue, the program's burden on third parties, and the program's over- or under-inclusiveness. Pet. App. 54-79.

The Tenth Circuit's holding finds ample support in the record and in this Court's equal protection jurisprudence.

Opp. Cert. at 17-30. That holding also finds support in relevant authority under international law and the domestic law of other countries facing similar issues.

SUMMARY OF ARGUMENT

International and comparative law support the lower court's decision upholding the DOT regulations, and are relevant to this Court's consideration of the constitutionality of affirmative action programs for two reasons. First, our common law system embraces an empirical approach to solving legal questions. There is practical value in examining how other constitutional courts have analyzed similar issues. Second, in an era of globalization, this Court maintains its intellectual leadership in the human rights field by acknowledging the international dimension of its decisions.

The United States is party to international treaties which not only permit race-based affirmative action programs, but which may also require the implementation of such programs when failure to do so would perpetuate wrongful discrimination. These treaties, the International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171, and the Convention of the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, allow race-based affirmative action policies in order to eliminate the effects of past and present society-wide discrimination. These treaties constitute the "Supreme Law of the Land" under the Supremacy Clause, and are thus valuable sources of interpretive guidance to this Court when considering the validity of the DBE program.

Furthermore, the constitutional courts of governments as diverse as Canada, India, South Africa, and the European Union have all confronted challenges to affirmative

action policies in recent years. These courts have uniformly upheld government employment policies comparable to the DBE program as consistent with their constitutional guarantees of equal protection. Indeed, the European Court of Justice has utilized a balancing test similar to this Court's strict scrutiny test to find affirmative action programs consistent with the equality guarantees of the Treaty Establishing the European Community. As members of this Court have previously recognized, wisdom gleaned from the opinions of colleagues in foreign jurisdictions can assist this Court in reaching sound conclusions under domestic law.

ARGUMENT

I. INTERNATIONAL AND COMPARATIVE LAW ARE RELEVANT SOURCES OF INTERPRETIVE GUIDANCE

American jurists, including members of this Court, have long recognized that international and comparative law perspectives can provide useful guidance when interpreting federal law. During the nineteenth century, "it was commonplace for American courts to follow developments in English courts." Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (Sept. 1998) (hereinafter "O'Connor, *Broadening Our Horizons*"); *see, e.g.*, *New England R.R. Co. v. Conroy*, 175 U.S. 323, 333 (1899) (finding decisions of "this court . . . to be in substantial harmony with the current of authority in . . . English courts" in determining scope of employer liability for employee's injury).

However, the willingness of American courts to consider international perspectives has never been limited to English common law. From its earliest days, this Court

has recognized that the laws of the United States should be construed to be consistent with international law whenever possible. *See, e.g.*, *Murray v. Schooner*, 6 U.S. (2 Cranch) 64, 118 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); Sandra Day O'Connor, *Federalism of Free Nations*, *reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M. Franck & Gregory H. Fox eds., 1996) (hereinafter "O'Connor, *Federalism of Free Nations*") (discussing *Charming Betsy*'s "acknowledge[ment] that the law of nations is an integral part of [our] jurisprudence"). And over the past fifty years, the Court has continued to recognize the importance of looking to international and comparative law for interpretive guidance in several areas of constitutional law. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710 & n.8 (1997) (noting that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide," and citing a Canadian decision discussing assisted suicide provisions in Austria, Spain, Italy, Great Britain, the Netherlands, Denmark, Switzerland, and France); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (considering international practices to analyze whether death penalty is constitutional as applied to 15-year-old); *Miranda v. Arizona*, 384 U.S. 436, 486-89 (1966) (looking to experiences in England, India, Scotland, and Ceylon to inform Fifth Amendment analysis of custodial interrogation practices).

In recent years, American judges, including several members of this Court, have signaled an increased willingness to consider international and comparative law when resolving domestic legal questions. In 1989, for example, Chief Justice Rehnquist called on domestic courts to consider international precedents, noting that in light of the establishment of "solidly grounded" constitutional traditions "in so many countries, it is time that

the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future—A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); *see also Thompson*, 487 U.S. at 851 (O'Connor, J., concurring) (invoking United States's ratification of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (entered into force for United States on Feb. 2, 1956), and its signature of two other international agreements that had not been ratified, as relevant expressions of international practice to consider when evaluating application of death penalty to 15-year-old defendant); *New York v. Quarles*, 467 U.S. 649, 672-74 (1984) (O'Connor, J., concurring) (discussing how Supreme Court analyzed laws of England, India, Scotland, and Ceylon to inform its holding in *Miranda*, 384 U.S. at 486-89, and concluding that "[t]he learning of these countries . . . should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today").

Two broad rationales justify the use of international and comparative law perspectives to help resolve domestic legal issues. First, there is a practical value to drawing upon international law and the experiences of other nations as aids to interpretation. As Justice Holmes wrote, "the life of the law has not been logic, it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). Justice Breyer, for example, has repeatedly noted the practical value that international and comparative perspectives can have. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (describing Supreme Court majority's approach to campaign finance regulation as consistent with

approaches taken by constitutional courts in other nations "facing similarly complex constitutional problems"); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting) (demonstrating that "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances," and citing cases from Canada, India, Great Britain, and Zimbabwe); *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (discussing how experiences of Switzerland, Germany, and the European Union may "cast an empirical light on the consequences of different solutions to a common legal problem").

Similarly, Justice O'Connor has recognized that "[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit." O'Connor, *Broadening Our Horizons*, *supra*, at 20. The possibilities for such learning are particularly strong when those other legal systems "have struggled with the same basic constitutional questions as we have: equal protection, due process, the rule of law in constitutional democracies." *Id.*; *see also Quarles*, 467 U.S. at 672-74 (O'Connor, J., concurring); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (noting that German and Italian constitutions "unmistakably draw their origin and inspiration from American constitutional theory and practice" and that as a result, "how [those countries] have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues"). In this regard, the use of international and comparative law is analogous to the use of state law by federal courts for interpretive guidance when giving content to federal law. In such circumstances, state law does not apply of its own force,

but instead supplies a useful source of persuasive authority. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392, 394-98 (1946) (Frankfurter, J.); *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-52 (1939) (Frankfurter, J.).

Second, acknowledging the international context of this Court's decisions helps to ensure the continued intellectual leadership of the United States in issues involving human rights, and to maintain international respect for our courts in an era of globalization. Throughout its history, this Court has served as a model for countries around the world. As Justice L'Heureux-Dube, of the Supreme Court of Canada, has explained, high courts in other countries have historically looked to the jurisprudence of this Court for guidance, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See* Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 16-17 (1998) (acknowledging United States's past judicial influence "[i]n the fields of human rights and constitutional principles"). However, as members of this Court have indicated, "United States courts, and legal scholarship in our country, generally, have been somewhat laggard in relying on comparative law and decisions of other countries." Rehnquist, *supra*, at 412; *see also* O'Connor, *Broadening Our Horizons*, at 20 (noting that American judges and lawyers "sometimes seem a bit more insular"); O'Connor, *Federalism of Free Nations*, *supra*, at 18 ("The flow of ideas from our Court to other tribunals around the world is well-chronicled, but we have not seen fit to reciprocate in kind."). To be sure, in many areas of constitutional law this Court has recognized the importance of looking to the laws and experiences of other nations, as noted above. Nevertheless, as Justice O'Connor has argued, we fail to "broaden[ ] our horizons" at our peril:

> The vibrancy of our common law legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive with systems that are able to cope with a rapidly shrinking world.

O'Connor, *Broadening Our Horizons*, *supra*, at 21; *see also* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 Alb. L. Rev. 417, 421-28 (2000) (arguing that in the 21st century, courts must acknowledge international context of decisions in order to maintain stature). As members of this Court have indicated, increased engagement with the constitutional courts of other countries can help to ensure the continued leadership role of American courts and the United States more generally.

Both of these rationales for considering international and comparative perspectives are relevant to the constitutionality of the DBE program at issue in this case. The United States is not alone among nations in using affirmative action to remedy the lingering effects and current practices of societal discrimination against particular social groups; nor has the United States been alone in requiring that such programs be reconciled with formal guarantees of equality before the law. Moreover, this Court's pronouncements on equality traditionally have carried tremendous weight in international human rights law and the constitutional law of other countries, and that prestige can only be enhanced by considering how other nations have interpreted the equality norms they share with the United States. As Justice Ginsburg has argued, consideration of the experiences of other

countries can serve an important function in the analysis of affirmative action:

> [C]omparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

Ruth Bader Ginsburg & Deborah Jones Merritt, *Lecture: Fifty-First Cardozo Memorial Lecture-Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999).

II. INTERNATIONAL AND COMPARATIVE LAW SUPPORT THE CONSTITUTIONALITY OF THE DBE PROGRAM

A. Treaties to Which the United States Is a Party Embrace Affirmative Action

In order to eliminate the effects of past and present society-wide discrimination, two treaties ratified by the United States specifically permit race-based distinctions: the International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(2), 999 U.N.T.S. 171, 173 (hereinafter "ICCPR" or the "Covenant"); and the Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 2(2), 660 U.N.T.S. 195, 218 (hereinafter "CERD"). Both treaties have garnered wide support within the international community, with 149 countries ratifying the ICCPR and 158 countries ratifying CERD. *See* U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1,*

2000, at 392-93, 449-50 (June 2000) (Dep't of State Pub. No. 9434). The United States does not enter into such treaty obligations lightly, for once ratified, treaties constitute the "supreme Law of the Land" under the Supremacy Clause. *U.S. Const.* art. VI, cl. 2. As noted above, members of this Court have recognized that international treaties can be a relevant source of guidance when interpreting domestic law. *See, e.g.*, *Thompson*, 487 U.S. at 851 (O'Connor, J., concurring); Ginsburg & Merritt, *supra*, at 255-61; O'Connor, *Federalism of Free Nations*, *supra*, at 15-16. The ICCPR and CERD offer relevant, legitimate sources of guidance for this Court's evaluation of whether the DBE program furthers compelling interests in remedying nationwide discrimination.

Article 26 of the ICCPR provides that "[a]ll persons are equal before the law" and that States Parties "shall . . . guarantee to all persons equal and effective protection against discrimination on any ground such as race." *Id.* at 179. Moreover, States Parties are bound to take "necessary steps" to effectuate rights guaranteed by the Covenant. ICCPR, *supra*, art. 2(2), 999 U.N.T.S. at 173. According to the Human Rights Committee created by the Covenant:

> The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters . . . .

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 18, ¶10, at 2 (1994) (hereinafter "General Comment 18").

The United States affirmed the Human Rights Committee's construction when it ratified the ICCPR. The formal "understanding" adopted at that time states in pertinent part:

> The United States understands distinctions based upon race . . .—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted which [sic] such distinctions are, at a minimum, rationally related to a legitimate governmental objective.

United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President). The Report of the Senate Committee on Foreign Relations, addressing the ICCPR, also noted that the Human Rights Committee had interpreted the treaty to allow certain forms of "differentiation":

> In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Id.; *see also* Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659, 662-63 n.12 (1997).

In sum, the ICCPR has been construed—by the United Nations Human Rights Committee and the United States Senate—to squarely permit affirmative action. Indeed, the Human Rights Committee has indicated that affirmative action may be "require[d]" when States Parties' failure to take such affirmative steps would perpetuate

discrimination. General Comment 18, *supra*, at ¶ 10, at 2.

CERD also embraces affirmative action programs as a proper remedy to redress past wrongs. While the treaty's general provisions outlaw all forms of racial discrimination, *see* CERD, *supra*, arts. 2-5, 660 U.N.T.S. at 216-22, certain "special measures" are expressly excluded from the definition of proscribed racial discrimination. As the Convention states in Article 1, paragraph 4:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

CERD, *supra*, art. 1(4), 660 U.N.T.S. at 216.

Again, the United States has expressly endorsed this approach. In his formal statement to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the treaty, Conrad Harper—who at the time was Legal Adviser to the State Department—noted:

> Article 1(4) explicitly exempts "special measures" taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection.

Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 Am.

J. Int'l L. 719, 722 (1994). Significantly, Article 2 of CERD also imposes on States Parties the *duty* to take special and concrete measures of affirmative action "when the circumstances so warrant." CERD, *supra*, art. 2(2), 660 U.N.T.S. at 218; *see also* Paust, *supra*, at 666-67. In ratifying CERD on November 20, 1994, the United States consented to all of its provisions.

B. High Courts in Other Jurisdictions Have Upheld Affirmative Action Measures

This Court also may find useful the experiences of other countries facing similar social problems in determining whether the DBE program meets the strict scrutiny standard established in *Adarand v. Pena*, 515 U.S. 200 (1995). *Amici* thus present examples of how other nations facing historical and present-day practices of society-wide discrimination have formulated affirmative action policies and how these nations have ensured that their policies do not violate the norm of equality before the law that has become enshrined as a fundamental human rights principle.

1. Other Nations Have Found That National Governments Have a Strong Interest in Supporting Flexible Affirmative Action Policies That Realize Constitutional Guarantees of Equality

The understanding of equality that animates federal affirmative action policies such as the DBE program is not unique to the United States. Nations as diverse as India, Germany, and Canada have adopted the equal protection principle in their constitutions and have wrestled with the proper role of affirmative action programs that seek to realize substantive equality while protecting the individual right to be free from discrimination. In every case, however, these countries have recognized a strong

governmental interest—one that would be characterized as "compelling" in the United States—in implementing affirmative action programs designed to dismantle the effects of society-wide discrimination.

Indeed, India, South Africa, Canada, and the European Union, among others, have recognized that historical discrimination can and should be identified and addressed at the highest levels of government. These systems have found the governmental interest in remedying past and current effects of discrimination sufficiently compelling to authorize affirmative action programs in their constitutional equal protection provisions. *See India Const.* art. 16(4) ("Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State . . . ."); *Can. Const.* (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), ¶ 15(2) ("[The equal protection guarantee] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, [or] sex . . . ."); *S. Afr. Const.* art. 9(2) ("[To] promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."); *Treaty Establishing the European Community*, Nov. 10, 1997, O.J. (C 340) 1 (1997) art. 141(4) ("[T]he principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."). These constitutions thus provide

explicitly what this Court has held implicitly: that the principle of equal protection is not inconsistent with race or gender-conscious action furthering the federal government's compelling interest in redressing discrimination. Indeed, affirmative action programs in these countries have reflected and advanced this compelling interest.

Like the United States, India is a democracy that confronts a history of racial injustice. As Justice Ginsburg recently has observed, the social category of "caste" has subjected particular social groups in India to unrelenting and systematic discrimination. Like racism in the United States and elsewhere, "casteism" in India—and the accompanying practice of "untouchability"—has persisted for generations and has created the need for measures to remedy the society-wide injustices suffered by individuals from lower castes and a variety of different disadvantaged social groups. Ginsburg & Merritt, *supra*, at 273-77.

While formal legal equality prevails in India,[2] the government and Supreme Court of India have recognized that constitutional guarantees of equal opportunity do not suffice to dismantle generations of discrimination. Rather, India has found that in order to remedy the persisting effects of pernicious caste practices, the Indian Constitution's formal guarantees of equality can and must be supplemented with affirmative action measures that directly address the historical disadvantage suffered by members of particular social groups. Indeed, such programs often have been understood in India as a means of vindicating these formal equality guarantees. For

[2] Since its adoption in 1950, the Constitution of India has abolished "untouchability." *India Const.* art. 17. It has also provided that "[t]he State shall not discriminate against any citizen on grounds . . . of . . . caste . . . ," *id.* art. 15.

example, in *Indra Sawhney v. Union of India*, A.I.R 1993 S.C. 477, the Supreme Court of India held that the affirmative action provisions of Article 16(4) of the Indian Constitution reinforced Article 16(1)'s guarantee of "equality of opportunity" in public employment, rather than creating an exception to this guarantee.[3] The Court held that "[f]or assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification." *Id.* at 539.

Similarly, the Supreme Court of India has recognized that certain affirmative action measures are consistent with the "equality before the law" and "equal protection" provisions of Article 14, a provision explicitly patterned after the Fourteenth Amendment to our Constitution.[4] In *Jagdish Saran v. Union of India*, A.I.R 1980 S.C. 820, 831, Justice Krishna Iyer noted that "the process of equalization and benign discrimination are integral, and not antagonistic to the principle of equality." *See id.* at 832 (holding that university admissions policy granting preferential treatment to graduates of a certain college was unconstitutional because these graduates were not "deprived categories of students," and distinguishing program from those affirmative action policies

[3] Article 16(1) provides: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." *India Const.* art. 16(1). Article 16(4) provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. . . ." *India Const.* art. 16(4).

[4] Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *India Const.* art. 14.

that are consistent with equality of opportunity). In reaching these conclusions, the Indian Supreme Court explicitly has recognized the similarities in the situations faced by India and the United States. In *Sahwney*, for example, the Court "examined the decisions of [the] U.S. Supreme Court at some length . . . with a view to notic[ing] how another democracy is grappling with a problem similar in certain respect to the problem facing [India]," A.I.R 1993 S.C. at 536, and noted that the "problem of blacks [in the United States] . . . holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India." *Id.* at 529.

South Africa is another example of a country that has developed affirmative action policies to remedy a history of racial injustice. As South Africa confronts its recent past of egregious discrimination, its judiciary has looked to the experiences of the United States, and particularly to the jurisprudence of this Court, as it engages in the task of realizing constitutional guarantees of equality. *See Public Servants' Ass'n of S. Afr. v. Minister of Justice & Others*, 1997 (5) BCLR 577 (T) (citing *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), and striking down as impermissibly broad an affirmative action program by South African Department of Justice that prohibited consideration of white males for certain attorney positions). While post-apartheid South Africa faces more extreme lingering structures of discrimination than exist in the United States, the central challenge facing both nations is the same: the translation of formal guarantees of equality into actual substantive equality. The South African government has explained the need for affirmative action programs in civil service employment to benefit non-white citizens: "the repeal of discriminatory legislation has created the formal conditions for equality of all South Africans. But repeal in itself has not created the substantive conditions of real equality

amongst all, because of the deep systemic roots of inequality inherited from the former era." Ministry for Public Service and Administration, Green Paper, *A Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service*, Notice 851/1997 in GG 18034 (May 31, 1997).

The Constitutional Court of South Africa has recognized, as has this Court, that formal legal equality does not automatically translate into actual equality of opportunity. As Justice Richard Goldstone has noted, courts must understand "that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical equal treatment in all circumstances before that goal is achieved." *President of S. Afr. v. Hugo*, 1997 (4) SALR 1, 41 (CC) (*quoted in City Council of Pretoria v. Walker*, 1998 (3) BCLR 257 (CC), 1998 SACLR LEXIS 27, *147). For South Africa, this affirmative action principle is a cornerstone of the strategy to transform post-apartheid society. The constitutionally-recognized compelling state interest reflected in that principle is expressed in the equal protection clause of the modern South African Constitution, which provides that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." *S. Afr. Const.* art. 9(2).

Other racially diverse nations similar to the United States have also developed affirmative action programs in employment. Under Canadian law, eliminating contemporary racial and gender-based discrimination and ameliorating the lingering effects of past discrimination constitute interests sufficiently compelling to justify tailored affirmative action programs. Canadian courts have

found that such programs are not inconsistent with equal protection norms. Indeed, under Canadian federal law, even private employers that are subject to federal regulation[5] face broad affirmative action obligations. Thus, the Employment Equity Act, 1995 requires that:

> Every employer shall implement employment equity by . . . instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in . . . the Canadian workforce, or . . . those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

1995 S.C., c. 44, § 5.[6] This Act recognizes that achieving true equality in a society in which women and members of minority groups have historically been subject to "disadvantage in employment" sometimes "means more than treating persons in the same way, but also requires special measures and the accommodation of differences." *Id.* § 2.

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5 The Employment Equity Act applies to, *inter alia*, "private sector employers" engaged in a "federal work, undertaking or business" as defined in § 2 of the Canadian Labour Code. *See* Employment Equity Act, § 3. Canada Labour Code § 2 in turn defines "federal work, undertaking or business" broadly to include various industries of national importance, and all businesses "outside the exclusive legislative authority of the legislators of the provinces." Canada Labour Code, R.S.C. 1988, c. L-2, § 2.

6 "Designated groups" is defined as including "women, aboriginal peoples, persons with disabilities and members of visible minorities." S.C. 1995, c. 44, § 3. "Members of visible minorities," in turn, is defined as "persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour." *Id.*

The European Court of Justice and the national courts of EU member states have faced similar questions concerning the permissibility of affirmative action policies. In Europe, affirmative action programs are most commonly designed to aid underrepresented groups in public employment. While both EU law and member state constitutional provisions guarantee equality and specifically prohibit discrimination based on gender, affirmative action policies nevertheless explicitly take gender into account in hiring and promotion decisions.[7] The equal protection jurisprudence in Germany is particularly well developed. While some German jurisdictions have begun to experiment with affirmative action in contracting programs, along lines similar to the DBE program at issue here,[8] most German affirmative action programs are concerned with hiring and promotion of women. Since 1989, 15 of the 16 German federal states have enacted affirmative action statutes seeking to promote the equality of women in state employment by increasing participation in civil service positions where women are underrepresented. The federal parliament enacted a similar statute in 1994.[9] These programs typi-

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7 *See* Council Directive 76/207, of Feb. 9, 1976, on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, art. 2(1) 1976 O.J. (L 39) 40 (establishing that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly"); Grundgesetz [Basic Law] art. 3(3) (F.R.G.) (establishing that "no one may be disadvantaged or favored because of their sex.").

8 *See* Berlin Statute on Equal Standing (Landesgleichstellungsgesetzt) of April 13, 1993 GVBl. § 13. Berlin 1993, 184, as amended June 29, 1995, GVBl. Berlin 1995. To our knowledge, this regulation has not yet given rise to any case law.

9 *See* Federal Statute on the Promotion of Women and the Compatibility of Family and Profession in the Federal Administration and the Federal Courts (Gesetz zur Foerderung von Frauen und der

cally take gender explicitly into account in order to remedy society-wide discrimination against women. While the German Constitutional Court has not yet ruled on these affirmative action policies, the European Court of Justice has endorsed these policies because they promote actual equality by counteracting "prejudices and stereotypes concerning the role and capacities of women in working life." Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547, ¶ 29.

2. Other Jurisdictions Analyze Affirmative Action Measures to Ensure a Proper Fit Between Means and Ends and Have Endorsed Measures Analogous to the DBE Program

Numerous countries have examined affirmative action programs under their own laws—and have upheld programs benefiting members of disadvantaged groups—using balancing tests that embrace principles of narrow tailoring. Most notably, in circumstances akin to the DBE program's use of race as a factor in certifying contractors as DBEs, the Court of Justice of the European Union has endorsed affirmative action in employment as a remedy for societal discrimination. The framework permitting affirmative action policies in the European Union originated in the 1976 Equal Treatment Directive, which established the equality of men and women in access to employment, promotion, and working condi-

Vereinbarkeit von Familie und Beruf in der Bundesverwaltung und den Gerichten des Bundes) of June 24, 1994, BGBl. 1994 I, 1406. *See generally* Anne Peters, *Women, Quotas and Constitutions: A Comparative Study of Affirmative Action for Women under American, German, European Community and International Law* 130-131 (1999).

tions.[10] The Directive is binding on all member states and supercedes conflicting national law. As in the United States, EU law does not mandate affirmative action, but the Equal Treatment Directive does permit regulations "without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities . . . ." 76/207, art. 2(4), 1976 O.J. (L 39). No fewer than three cases considering the permissibility of affirmative action under this article have been referred to the European Court of Justice.

The European Court of Justice has consistently held that affirmative action policies cannot give absolute and unconditional preference to members of disadvantaged groups, because such "hard quotas" violate equal protection guarantees. *See Marschall*, ¶¶ 23, 24. While the ECJ thus protects the individual right to remain free of discrimination as a core constitutional value, the ECJ has upheld affirmative action policies when protected class status is one of many factors in an employment decision that considers the relative disadvantage of applicants.

The policies permitted by EU law are analogous to the DBE program at issue in this case, insofar as they permit flexibility and case-by-case consideration of disadvantaged status. In the *Marschall* case, the European Court of Justice considered the acceptability under European law of a German national rule that permitted giving priority for promotions to equally qualified female candidates in civil service jobs where women were under-

[10] Council Directive 76/207, art. 1(1), 1976 O.J. (L 39) 40. The European Council has continued to express its support of affirmative action policies. In the non-binding Recommendation of 13 December, 1984 (48/635/EEC) the European Council explicitly proposed that all member states adopt affirmative action policies to eliminate the negative effects of previous discrimination and to stimulate participation by women in all sectors of the economy.

represented. *See id.* The rule contained a "saving clause," which specifically allowed the promotion of the male competitor where non-discriminatory criteria tilted the balance in his favor. Such criteria could include, but were not limited to, the relative economic need of the applicants. While a German court referred this case to the ECJ, in the course of the proceedings the governments of other EU member states (including Austria, Finland, Norway, Spain and Sweden) formally endorsed the affirmative action policy at issue. *See Marschall*, ¶ 14. The European Court of Justice found that as long as the rule guarantees that "the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates," the affirmative action policy would prevail. *See Marshall*, ¶ 35.

The ECJ's recent decision in *Badeck* follows the same logic. Case C-158/97, *Badeck and Others, Proceedings for a Review of Legality*, [2001] 2 C.M.L.R. 6. The case underscores the similarity between affirmative action policies permitted under European law and U.S. affirmative action policies. In that case, the Court considered the legality under EU law of a civil service affirmative action program in the German state of Hesse, which included binding goals and timetables for the hiring of women. Building upon its judgment in *Marschall*, the Court concluded that the policy of granting preference to equally qualified female candidates over male candidates was lawful so long as the preference was not absolute. In other words, where a "saving clause" guarantees that the protected category of gender is one criterion among others in the overall evaluation of the candidates, and does not mandate success by the female candidate, the affirmative action policy is not incompatible with European law. *See id.*at ¶ 38.

This "saving clause" in the European legislation is thus similar to the rebuttable presumption of disadvantage in the regulations promulgated by the DOT. In neither case does membership in a statutorily-defined disadvantaged group automatically confer the benefit of the affirmative action program on an individual to the automatic exclusion of another competitor. Under European law, the candidate's gender is a factor—one of several—that may be considered in a hiring decision. The DBE program, however, does not even go that far. Under the rules of the DBE program, no person is conclusively deemed to enjoy DBE status: membership in a particular racial group merely creates a *presumption* of disadvantage that must be confirmed in evidence by actual disadvantage before any individual is ultimately entitled to DBE status. 49 C.F.R. § 26.67 (a)(1). Moreover, under both systems, the benefits to be conferred upon disadvantaged groups (women under the European legislation and DBEs in the United States) are not absolute. Thus, under the DOT rules, individuals who are not members of racial minorities may also be entitled to DBE status under certain circumstances.[11] 49 C.F.R. § 26.67 (d). Similarly, under the affirmative action policies permitted under European law, women are presumptively entitled to preference in the relevant employment decisions, but a male candidate may trump that presumption in cases where, according to criteria that may include economic need, the balance tips in his favor.

Significantly, in both *Badeck* and *Marschall* the European Court of Justice relied implicitly on a proportionality test that resembles the strict scrutiny analysis in

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[11] Indeed, Petitioner itself was certified as a DBE in this case. Pet. App. 7–9.

United States jurisprudence.[12] As Advocate General Jacobs[13] advised the European Court in the *Marschall* case, "the principle of proportionality will, however require . . . [any affirmative action program pursuant to Art 2(4) of the Treaty of the European Union to] be both suitable and necessary for the achievement of its objective."[14] Under the traditional understanding of the four-pronged test in the German jurisprudence from whence it derives,[15] the statute must serve a constitutional objective, be suitable and necessary to achieve the goal, and be equitable under due consideration of the conflicting rights in the situation. In the *Marschall* and *Badeck* cases, the European Court had to consider, first, whether there was a close fit between the affirmative action program and the goal of ameliorating discrimination, and second, whether male candidates were unfairly excluded from jobs because of their gender. The next questions concerned whether gender-conscious appoint-

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12 Of course, in United States jurisprudence, such sex-based classifications would be subject to intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515 (1996).

13 Under the procedure of the ECJ, Advocate General opinions serve as objective legal opinions about the case at bar, and are not intended to be partisan.

14 *Marschall*, Adv. Gen. Op. ¶ 42.

15 On the similarity of the European proportionality test (derived from German jurisprudence) to strict scrutiny, *see* Peters, *supra*, at 150-52. Peters notes that while the traditional test that was applied to the general equality clause was a test of arbitrariness derived from the United States's rational basis test, since the 1980s the German courts have "tended to scrutinize classifications [. . .] more closely by asking whether a differential treatment is proportionate." The closer the government classification comes to protected classes enumerated in art. 3(3) of the Basic Law, the stricter the scrutiny is. On the adoption of the proportionality test by European Union law, *see* Peters, at 203, n.478.

ments and promotions pursued a legitimate social objective and utilized means that were proportionate "in relation to the real needs of the disadvantaged group." *Badeck*, Adv. Gen. Op. ¶ 29. Applying this standard in *Badeck*, the European Court of Justice concluded that a program including such discretion was sufficiently customized to pass muster under Community law. *Id.* ¶¶ 38, 46, 55, 63.

Indian courts have also analyzed affirmative action polices to ensure that these programs are closely tailored to target the truly disadvantaged. In *Sawhney*, A.I.R 1993 S.C. 477, the Supreme Court of India called for a holistic definition of "backward classes" that includes both caste and economic disadvantage as eligibility criteria. *Id.* at 562 (reviewing national standards developed by Mandal Commission for implementing affirmative action programs to benefit statutorily-defined "backward classes"). To ensure that affirmative action programs were well targeted, the Court further required affirmative action programs to use a "means test," in order to exclude advantaged individuals from the group of "backward classes" who benefit from such programs. *Id.* at 558-59. To this purpose, the Court directed the Government of India to set forth specific objective criteria (including economic, social, and educational position) for making an individualized determination of disadvantage for members within each "backward class." *Id.* at 560. The Court noted that in Indian society, it is exceptional yet possible for individuals from certain low-level castes to attain economic and social advancement sufficient to disqualify them as affirmative action beneficiaries. The "means test" approved by the Indian Supreme Court is thus similar to the rebuttable presumption of disadvantage in the DOT regulations, which require DBE applicants to demonstrate that their net

worth does not exceed a specified level and that they are indeed actually disadvantaged. 49 C.F.R. § 26.67 (b).

Canadian law likewise imposes limits on the breadth of affirmative action programs. The Employment Equity Act, 1995, for example, precludes the imposition on an employer of an affirmative action program that would "cause undue hardship on an employer" or "require an employer to hire or promote unqualified persons." S.C. 1995, c. 44, § 3. Nevertheless, the Supreme Court of Canada typically has upheld programs that give employers far less discretion than the current DOT program. The leading affirmative action case before the Supreme Court of Canada addressing such programs is *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (Can.). At issue was a decree by the Canadian Human Rights Commission (the "Commission") concerning a finding that the Canadian National Railway (the "Railway") had discriminated against female employees and job applicants by barring them from blue-collar jobs. The decree required that one in four new hires by the Railway be women until a target percentage of women in the blue-collar workforce at the Railway had been reached. *See id.* at 1125-27. In ordering this relief, the Commission emphasized that it was limiting the scope of its decree in order to avoid imposing an undue burden on the employer. Thus, although the panel indicated its preference that the Railway be directed to make one in three new hires a woman, it ordered the less burdensome standard that one in four new hires be a woman. Moreover, the one in four target itself was to be assessed every four months, in order to allow for maximum flexibility in individual hiring decisions. On review, the Supreme Court of Canada rejected the Railway's argument that specific hiring goals represented improper remedial relief under the Canadian Human Rights Act of

1976, noting that the Commission's order was "tailored specifically to address the problem of 'systemic discrimination.' " *Canadian Nat'l Ry.*, [1987] 1 S.C.R. at ¶ 45. (citations omitted). The Court emphasized that "there is evidence that when sufficient minorities/women are employed in a given establishment, the informal processes of economic life, for example, the tendency to refer friends and relatives for employment, will help to produce a significant minority or female applicant flow." *Id.*

* * *

In sum, international and comparative law provide useful and relevant sources of guidance for this Court in interpreting the affirmative action program at issue. International treaties ratified by the United States specifically permit race-based distinctions and, in fact, may require states to take affirmative action where failure to do so would perpetuate discrimination. Courts in other jurisdictions grappling with similar problems have upheld comparable programs as a means of furthering compelling government interests in promoting equality, analyzing such measures to ensure a proper fit between means and ends and concluding that flexible affirmative action programs help realize the principle of equality, rather than detract from it. As Justice Ginsburg has noted, we share with those nations the determination to eliminate social and economic disadvantages caused by society-wide discrimination. *See* Ginsburg & Merritt, *supra*, at 282. As such, this Court should draw upon the experiences of those nations when analyzing the constitutionality of the DBE program.

CONCLUSION

The DBE program is consistent with equal protection as understood in the United States and the larger global community, and, for the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX: ORGANIZATIONAL STATEMENTS OF INTEREST

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. NOW Legal Defense has participated as counsel and as *amicus curiae* in numerous cases in support of affirmative action. It is interested in this case because of the positive impact affirmative action programs have in promoting equality and eliminating barriers for women, particularly for racial minorities.

Lawyers Committee for Human Rights (Lawyers Committee) is a non-governmental organization that protects and promotes the rights to which everyone is entitled under international law. The Lawyers Committee works to hold all governments—including the United States—accountable to the standards articulated in the Universal Declaration of Human Rights and other international human rights instruments, including the U.N. Convention on the Elimination of Racial Discrimination. The Lawyers Committee has a particular focus on defending the rights of disadvantaged and vulnerable groups, including women and racial minorities. In recognition of the fundamental principle of non-discrimination, which underlies all human rights standards, the Lawyers Committee works to promote the equal enjoyment of the universal rights to which all people are entitled. In furtherance of this agenda, the Lawyers

Committee will participate in the World Conference Against Racism in Durban, South Africa in September 2001 to work with governments and others towards the development of strategies to eliminate racial discrimination in the United States and around the world, of which affirmative action programs such as that at issue in this case are an important part.

Allard K. Lowenstein International Human Rights Clinic (the Clinic) is a Yale Law School program that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes numerous litigation and research projects each term on behalf of human rights organizations and individual victims of human rights abuses. The Clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the Clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.